(24,591)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 847.

THE CHICAGO & ALTON RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

JOSEPH M. WAGNER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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1 At a Supreme Court begun and held at Springfield on Tuesday, the Seventh Day of October, in the Year of Our Lord One Thousand Nine Hundred and Thirteen, within and for the State of Illinois.

Present: The Honorable George A. Cooke, Chief Justice; Honorable Jas. H. Cartwright, Justice; Honorable Wm. M. Farmer, Justice; Honorable Alonzo K. Vickers, Justice; Honorable Orrin N. Carter, Justice; Honorable Frank K. Dunn, Justice; Honorable Charles C. Craig, Justice; Patrick J. Lucey, Attorney General; Warren C. Murray, Marshal.

Attest:

J. McCAN DAVIS, *Clerk.*

Be it remembered, that to-wit, on the Seventeenth day of September, A. D. 1913, the same being one of the days in vacation before the term of Court aforesaid, the petitioner, Chicago & Alton Railroad Company, filed its petition for a writ of certiorari in the office of the Clerk of the Supreme Court together with records from the Superior Court of Cook County and Appellate Court First District and abstracts of the same, which said transcripts of record are in the words and figures following:

2 492, 18032, 9198, 35.

Record from Superior Court of Cook County to Appellate Court.

"A."

Gen. No. 273,695.

JOSEPH M. WAGNER
vs.
CHICAGO AND ALTON RAILROAD COMPANY.

Filed Appellate Court Oct. 4, 1911. Alfred R. Porter.

Filed Sept. 22, 1913. J. McCan Davis, Clerk of Supreme Court.

3 *Placita, Superior Court of Cook County.*

UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
County of Cook:

Pleas before the Honorable John McNutt, Judge of the City Court of Mattoon, of the State of Illinois, holding a branch Court of the Superior Court of Cook County, in the State of Illinois, by the request of the Judges of said Superior Court, at a regular term of said Superior Court of Cook County begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the First day, of May, in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States of America the one hundred and Thirty Five.

Present:

The Honorable John McNutt, Judge of the City Court of Mattoon of the State of Illinois.
John E. W. Wayman, State's Attorney.
Michael Jimmer, Sheriff of Cook County.

Attest:
CHARLES W. VAIL, *Clerk.*

Be it remembered that heretofore, to-wit the 15th day of July, A. D. 1909, a certain Præcipe was filed in the office of the Clerk of said Court, in words and figures following to-wit:

4 *Præcipe, Superior Court.*

STATE OF ILLINOIS,
County of Cook, ss:

Superior Court of Cook County, July Term, A. D. 1909.

JOSEPH M. WAGNER, Plaintiff,
vs.
CHICAGO AND WESTERN INDIANA RAILROAD COMPANY and ATKINSON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendants.

Case. Damages, $30,000.00.

The Clerk of said Court will issue a Summons in the above entitled cause to said Defendants in a plea of Trespass on the case, to the damages of said Plaintiff in the sum of Thirty Thousand ($30,000.00) Dollars, direct the same to the sheriff of Cook County to

execute and make it returnable to the September Term of said Court, A. D. 1909.

JAMES C. McSHANE,
Plaintiff's Attorney.

To Charles W. Vail, Esq., Clerk.

Chicago, July 15, 1909.

5 The following appears on the back of the Præcipe.

273,695. Superior Court of Cook County. Joseph M. Wagner vs. C. *E.* W. I. R. R. Co. et al. Præcipe. Paid $10.00. Filed July 15, 2-54 P. M., 1909. Charles W. Vail, Clerk, per H. James C. McShane, Plaintiff's Attorney.

6 Thereupon on the same day to-wit, on the 15th day of July A. D. 1909 a certain People's Writ of Summons issued out of the office of the Clerk of said Court and under the Seal thereof directed to the Sheriff of Cook County to execute which writ together with the return of the Sheriff thereon endorsed are in words and figures following to-wit:

Summons.

STATE OF ILLINOIS,
Cook County, ss:

The People of the State of Illinois to the Sheriff of said County, Greeting:

We, command you that you summon Chicago and Western Indiana Railroad Company and Atchison Topeka and Santa Fe Railway Company, if they shall be found in your County, personally to be and appear before the Superior Court of Cook County, on the first day of the Term thereof, to be holden at the Court House, in the City of Chicago, in said Cook County, on the first Monday of September next, to answer unto Joseph M. Wagner, in a plea of Tresspass on the case to the damage of said plaintiff, as it is said, in the sum of Thirty Thousand ($30,000.00) Dollars.

And have you then and there this writ, with an indorsement thereon, in what manner you shall have executed the same.

Witness, Charles W. Vail, Clerk of our said Court, and the Seal thereof, at Chicago, aforesaid, this 15th day of July A. D. 1909.

[SEAL.] CHARLES W. VAIL, *Clerk.*

"Served this writ on the within named Atkinson, Topeka & Santa Fe Railway Company, a corporation by "delivering a copy thereof to Lee F. English attorney & Agent of said corporation this 16th day of July 1909.

"The president of said corporation not found in my county

CHRISTOPHER STRASSHEIM, *Sheriff,*
By HENRY F. HEMMAN, *Deputy.*

"Served this writ on thr within named defendant Chicago & Western Indiana Railroad Company, a corporation by delivering a copy thereof to W. L. Reed, attorney & Agent of said corporation this 19th day of July 1909.

CHRISTOPHER STRASSHEIM, *Sheriff,*
By P. J. McSHANE, *Deputy.*

The president of said corporation not found in my county.

7 And afterwards to-wit on the 18th day of August A. D. 1909 the following proceedings were had and entered of record in said Court to-wit:

273,695.

JOSEPH M. WAGNER
vs.
CHICAGO AND WESTERN INDIANA RAILWAY COMPANY et al.

Case.

On motion of plaintiff'- Attorney it is ordered that all papers and proceedings in said cause, be and are hereby amended by discon-*con*tinuing as to the defendants, Chicago and Western Indiana Railway Company and Atchison Topeka — Santa Fe Railway Company, without costs and it is further ordered that all papers and proceedings be and are hereby am*m*ended by making The Chicago and Alton Railway Company, party defendant and summons do issue therefor.

And afterwards to-wit on the 20th day of August A. D. 1909, a certain declaration was filed in the office of the Clerk of said Court in words and figures following to-wit.

8 STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 273,695, Term No. 6501.

JOSEPH M. WAGNER
vs.
CHICAGO AND ALTON RAILROAD COMPANY.

Case. Damages, $30,000.00.

Joseph M. Wagner, plaintiff by James C. McShane, his attorney complains of Chicago and Alron Railroad Company, defendant of a Plea of Trespass on the case.

For that, whereas, the plaintiff alleged, that long prior to and on, to-wit, the 15th day of December A. D. 1908, the defendant

Chicago and Alton Railroad Company owned, possessed and operated a certain railroad, which extended, among other places from Chicago, in the County and State aforesaid; into and through other states, and it was then and there a common carrier of railroad, and as such then and there angaged upon, by and in connection with its said railroad and the track, hereinafter referred to, in commerce between the several states and The Chicago Burlington and Quincy Railroad Company also, long prior to and then and there, owned possessed and operated a certain other railroad which extedned among other places from Chicago aforesaid into and through other states, and it was then and ther- a common carries by railroad, and as such was then and there engaged upon, by, and in connection with its said railroad *and* commerce between the several states, and the plaintiff was then and there employed by the said Chicago Burlington and Quincy Railroad Company in such commerce as a switchman, to work and switch upon and in connection with certain engines and cars, which it was and there operated upon and in connection with its said railroad in such com-
9 merce and as such switchman he earned, to-wit, One Hundred Dollars per month, and the plaintiff further alleges that the defendant, Chicago and Alton Railroad Company, then and there owned, possessed and operated a certain track which constituted a part of its said railroad, and which said track furnished a connection between its said railroad and a certain other railroad in Chicago, aforesaid, and upon and over which said track and the defendant and the Chicago Burlington and Quincy Railroad Companies and other railroad companies, at the invitation and with the knowledge and consent of the defendant, where long prior to and then and there, accustamed to operate certain engines and cars.

And the plaintiff further alleges that at the time aforesaid, the said Chicago Burlington and Quincy Railroad Company at the invitation and with the knowledge and consent of defendant, and for a valuable consideration inuring to the defendant was operating one of its the Chicago Burlington and Quincy Railroad Company said trains, upon which the plaintiff was employed as such switchman, upon and over said track which connected defendant's said railroad with a certain other railroad, as aforesaid.

And the plaintiff further alleges that the defendant, long prior to the time in question, wrongfully and negligently caused or permitted to be placed a certain semaphore, or signal post, along side of and so close to its said track, and said post was likely and liable to crush switchman against, or knock them from the side or sides of cars, while being so operated upon said track past said post and it wrongfully and negligently permitted said post to be and remain in said position from thence to and including the time of the injuries herein after complained of, whereby the switchman employed upon trains which were operated over said track,
10 as aforesaid, were exposed to great danger of bodily injury, and all of which facts he alleges, the defendant and the Chicago, Burlington & Quincy Railroad Company knew, or by the exercise or ordinary care in that behalf would have known a suffi-

cient length of time, prior to the injuries hereinafter complained of, to have enabled them, and each of them, by the exercise of ordinary care, to have had said conditions remedied, but the plaintiff, through no want of ordinary care upon his part, did not know of the said position of the said post in refe ce to said track, or the danger incident thereto, and the plaintiff a eges that the defendant and the Chicago Burlington and Quincy Railroad Company also knew, or by the exercise of ordinary care in that behalf would have known that plaintiff was so employed upon said train and of his said lack of knowledge of the said position of said post and of the danger incident thereto in sufficient time, prior to said injuries, to have enabled them, and each of them by the exercise of ordinary care, to have notified or informed the plaintiff of the said position of said post and of the danger incident thereto, and it was their duty to have done so, but they and each of them negligently failed and neglected to so notify or inform him.

And the plaintiff further alleges that upon the occasion in question, while he in the discharge of his duty as such switchman was riding upon the side of one of the cars of the said train, upon which he was employed as aforesaid, while it was being operated upon and over said track and past said post, and while as he alleges, he was exercising ordinary care and caution for his own safety.

As a direct result and in consequence of the said dangerous proximity of said post to said track, and of his being uninformed of that fact, he was thereby then and there caught and crushed between said post and the side of said car, and was knocked from the side of said car to and upon the ground there, and the bones of his pelvis, and diverse other bones, ligaments, muscles, tendons and membranes of his body were thereby then and there sprained, dislocated,
11 broken and otherwise injured, and he was cut bruised and wounded about his head, face, limbs and body, and sustained serious injuries to divers of his internal organs, including an in general herein, and a serious shock and injury to his spine and nervous system and mental faculties, and as a direct result thereof he has ever since suffered, and will continue permanently to suffer great bodily and mental pain, and has become and is permanently disfigured, crippled sick sore disordered and incapacitated from attending to or transacting his regular business or any ordinary business or affairs and he has thereby been and will continue permanently to be deprived of large earnings which he might and otherwise would have made and acquired, and he has been compel-ed to and did incur, expend and lay out and will continue to be required to incur expend and lay out for medical attention nursing medicines and otherwise diverse large sums of money amounting to, to-wit: Five Hundred Dollars in and about ende-voring to be cured of his said injuries sickness and disorders occasioned as aforesaid.

To the damage of the plaintiff of Thirty Thousand Dollars wherefore he brings this suit, etc.

JAMES C. McSHANE,
Attorney for Plaintiff.

12 And afterwards to-wit, on the 30th day of August A. D. 1909 a certain People's writ of summons issued out of the office of the Clerk of said Court, and under the Seal thereof, directed to the Sheriff of Cook County to execute which writ together with the return of the Sheriff thereon endorsed, are in words and figures following to-wit.

Summons.

Superior Court.

STATE OF ILLINOIS,
Cook County, ss:

The People of the State of Illinois to the Sheriff of said County, Greetings:

We command you that you summon Chicago and Alton Railroad Company if it shall be found in your county personally to be and appear before the Superior Court of Cook County on the first day of the term thereof, to be holden at the Court House in the City of Chicago in said Cook County, on the first Monday of October next, to answer unto Joseph M. Wagner, in a Plea of trespass on the case to the damage to said plaintiff, as it is said in the sum of Thirty Thousand Dollars, ($30,000.00), and have you then and there this writ with an endorsement thereon what manner you shall have executed the same.

Witness, Charles W. Vail, Clerk of our said Court and the seal thereof at Chicago, aforesaid this 30th day of August A. D. 1909.

CHARLES W. VAIL, *Clerk.*

P'd 1.75 M. 10.

"Served this writ on the within named Chicago and Alton Railroad Company a corporation," by delivering a copy thereof to S. H. Strawn attorney and agent of said corporation, this 10th day of September 1909. President of said corporation not found in my county. 1909.

CHRISTOPHER STRASSHEIM, *Sheriff,*
By HENRY F. HERMAN, *Deputy.*

13 And afterwards to-wit on the 5th day of October A. D. 1909 a certain plea was filed in the office of the Clerk of said Court in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County, to the October Term, 1909.

Gen. No. 273,695, Term No. 6501.

JOSEPH M. WAGNER
vs.
CHICAGO AND ALTON RAILROAD COMPANY.

And the defendant by Winston Payne Strawn and Shaw its Attorneys comes and defends the wrong and injury, when, etc. and says

that it is not guilty of the supposed grievances above laid to its charge, or any other of them, in manner in form as the plaintiff as above thereof complained against it, and of this the said defendant puts itself upon the country.

And for a further plea in this behalf the said defendant says that the plaintiff ought not to have his aforesaid action against the said defendant, because it says that it did not own, possess or operate at the time complained of its said declaration and does not now own, possess or operate, said railroad track or semaphore complained of in the said declaration, and this the said defendant prays may be inquired into by the country.

WINSTON, PAYNE, STRAWN, AND SHAW,
Attorneys for the Defendant.

14 And afterwards *on* to-wit on the 16th day of December A. D. 1910 the following proceedings were had and entered of record in said Court:

273,695.

JOSEPH M. WAGNER
vs.
CHICAGO AND ALTON RAILROAD CO.

Case.

On motion of the plaintiff'- Attorney it is ordered that leave be and is hereby given the plaintiff to file an amendment to his declaration filed herein instanter and the defendant be required to plea thereto, within ten days from this date.

And afterwards to-wit on the 16th day of December A. D. 1910 a certain amendment was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 273,695, Term No. 6501.

JOSEPH M. WAGNER
vs.
CHICAGO AND ALTON RAILROAD COMPANY.

Now comes the plaintiff, by leave of Court, and amends his declaration filed herein, by inserting in the ninth line from the bottom of the third page thereof after the word "faculties" the following words:

15 "And he thereby also sustained a serious and permanent injury of and to his sexual and procreative organs and of the functions of the same," and by inserting in the eighth line from the bottom of the same page the words, "His aforesaid injuries" in lieu of the word "thereof."

JAMES C. McSHANE,
Attorney for Plaintiff.

And afterwards to-wit on the 23rd day of December A. D. 1910 a certain plea was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 273,695, Term No. 6501.

JOSEPH M. WAGNER
vs.
CHICAGO AND ALTON RAILROAD COMPANY.

Now comes the defendant, Chicago & Alton Railroad Company by Winston, Payne, Strawn & Shaw, its attorneys, and defends the wrong and injury, when, etc., and says that it is not guilty of the said several supposed grievances laid to its charge or any or
16 either of them, as the same are set forth in the plaintiff's amended declaration, and of this the defendant puts itself upon the country, etc.

WINSTON, PAYNE, STRAWN & SHAW,
Attorneys for Defendant.

And afterwards to-wit on the 10th day of April 1911 a certain Simuliter was filed in the office of the Clerk of said Court, in words and figures to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 273,695, Term No. 6501.

JOSEPH M. WAGNER
vs.
CHICAGO AND ALTON RAILROAD COMPANY.

And the plaintiff, as to the pleas of the defendant by it above pleaded, and whereof it has put itself upon the country does the like.

JAMES C. McSHANE,
Attorney for Plaintiff.

17 And afterwards to-wit on the 12th day of April A. D. 1911 the following proceedings were had and entered of record in said Court to-wit:

273,695.

JOSEPH M. WAGNER
vs.
CHICAGO AND ALTON RAILROAD COMPANY.

Case.

On motion of the defendant's attorney it is ordered that leave be and is hereby given, the defendant to file its special plea to the plaintiff's declaration herein instanter, to which the plaintiff excepts.

And afterwards to-wit on the 12th day of April A. D. 1911 a certain special plea was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 273,695, Term No. 6501.

JOHN M. WAGNER, Plaintiff,
vs.
CHICAGO & ALTON RAILROAD COMPANY, Defendant.

18 Now comes the defendant, Chicago & Alton Railroad Company by Win-ton, Payne, Strwan and Shaw, leave of court having first been had and obtained, and files this its additional plea to the declaration as amended.

And for a further plea in this behalf the defendant, Chicago & Alton Railroad Company says that the plaintiff ought not to have his aforesaid action against this defendant, because it says that it did not own, nor operate, nor was it possessed of prior to and at the time complained of in the amended declaration, nor at any other time, the railroad tracks, engine, cars, or any part thereof, as is alleged in the plaintiff's declaration and amendment thereto, nor did this defendant invite the Chicago Burlington & Quincy Railroad Company and other railroad companies to operate certain engines and cars upon the tracks, nor did it have knowledge of or consent to the use of said tracks by other railroad companies, as is alleged in the plaintiff's declaration and the amendment thereto:

And this defendant further says that the plaintiff was not employed in any capacity whatever by this defendant, nor was he the servant of this defendant, at the times alleged in the plaintiff's declaration and the amendment thereto.

And this defendant denies that it caused or permitted the semaphore, or signal post, to be placed as is alleged in the plaintiff'- declaration and the amendment thereto, nor did this defendant own, operate, control, or manage the said semaphore, or signal post, nor did this defendant permit said post to remain in the position it was in, as *in* alleged in the plaintiff's declaration and the amendment thereto. And this defendant denies that said semaphore or signal post, was upon the right of way tracks or real estate, *or* this defendant at the time alleges in the declaration and the amendment thereto.

And this this defendant prays may be inquired of by the country.

WINSTON, PAYNE, STRAWN AND SHAW,
Attorney- for Defendant.

19 And afterwards to-wit, on the 10th day of May A. D. 1911 the following proceedings were had and entered of record in said Court to-wit:

273,695.

JOSEPH M. WAGNER
vs.
CHICAGO & ALTON RAILROAD COMPANY.

Case.

On motion of plaintiff's attorney it is ordered that leave be and is hereby given to the plaintiff to file additional counts to his declaration herein instanter and the defendant required to plea- thereto within three days from this date.

And on to-wit *on* the 10th day of May A. D. 1911, a certain additional counts was filed in the office of the Clerk of said Court in words and figures following to-wit:

STATE OF ILLINOIS,
Cook County, ss:

In the Superior Court of Cook County.

20 Gen. No. 273,695. Term No. 6501.

JOSEPH M. WAGNER
vs.
CHICAGO & ALTON RAILROAD COMPANY.

Case.

Additional Counts.

And now comes the plaintiff, leave of Court being first had for that purpose and files the following additional counts:

For that, Whereas, the plaintiff alleges, that long prior to and on, to-wit, the 15th day of December A. D. 1908, the defendant Chicago and Alton Railroad Company, owned, possessed and operated a certain railroad which extended among other places to Chicago, and in the County and State aforesaid, and The Chicago Burlington — Quincy Railroad Company, long prior to and then and there owned, possessed and operated a certain other railroad which extended among other places through Chicago aforesaid, and the plaintiff was then and there employed by the said Chicago Burlington and Quincy Railroad Company as a switchman to work and swit-h upon and in connection with certain engines and cars which it was then and there operating upon and in connection with its said railroad, and as such switchman he earned, to-wit One Hundred Dollars per month.

And the plaintiff further alleges that the defendant Chicago and Alton Railroas Company then and there owned possessed and operated a certain track which constituted a part of its said railroad and which said track furnished a connection between its said railroad and a certain railroad in Chicago, aforesaid, and upon and over which said track the Chicago Burlington & Qunicy Railroad
21 Company, and other railroad companies, at the invitation and with the knowledge and consent of the defendant were, long prior to and then and there, accustumed to operate a certain engines and trains of cars.

And the plaintiff further alleges that at the time aforesaid the Chicago Burlington & Quincy Railroad Company, at the invitation, and with the knowledge and consent of the defendant, and for a valuable consideration inuring from it to the defendant, *with* operating one of its the Chicago Burlington — Quincy Railroad Company's said trains upon which the plaintiff was employed as such *w*switchman upon and over said track which connected defendant's said railroad with a certain other railroad as aforesaid.

And the plaintiff further alleges that long prior to the time in question, there was a certain semaphore or signal post placed along side of and so close to the defendant's said track *and* said post was likely and liable to crush switchman against or knock them from the side or sides of cars while being so operated upon said track past said post, and defendant wrongfully and negligently permitted said post and track to so be and r-*a*min in such close proximity to each other, from thense to and including the times of the injuries hereinafter complained of, whereby the switchman employed upon tracks which were operated over said track as aforesaid, weere exposed to great danger of bodily injury and all of which fact- plaintiff alleges the defendant knew or by the exercise of ordinary care in that behalf, would have known a sufficient leng*ht* of time prior to the injuries hereinafter complain*d*ed of to have enabled it by the exercise of ordinary care, to have rem*i*died said conditions, but the plaintiff through no want of ordinary care upon his part did not know of the said position of the said post in reference to said track or the danger incident thereto, and the plaintiff further alleges that upon the oc-assion in question while he, in the discharge of his duty as such

switchman was riding upon the side of one of the cars of
22 said train, upon which he was employed — aforesaid, while it was being so operated upon and over said track and past said post, and while, as he alleges he was exercising ordinary care and caution for his own safety, as a direct result and in consequence of the said dangerous proximity of said post to said track, he was thereby then and there caught and crushed between said post and the side of said car and was knocked from the said car to and upon the ground there and by means of the premises the plaintiff sustained and incurred the injury, disabilities, loss, damages, pain, suffering and obligations as described and set forth in the or-ginal declaration, as amended filed herein, as to which said declaration, for a discription of the same he here refers.

Second Additional Count. And, for that, whereas, the plaintiff alleges that long prior to and on, towit, the 15th day of Decemner A. D. 1908, the defendant, Chicago & Alton Railroad Company, owned possessed and operated a certain railroad which extended among other places through Chicago, in the County and State aforesaid, and the Chicago Burlington & Quincy Railroad Company also, long prior to and then and there owned and possessed and operated a certain railroad, which extended, among other places through Chicago, aforesaid, and the plaintiff was then and there employed by the said Chicago Burlington and Qu*nicy* Railroad Company, as a switchman, to work and switch upon and in connection with certain engines and cars which it was then and there operating upon and — connection with its said railroad, and as such switchman he earned, to-wit, One Hundred Dollars per month, and the plaintiff further alleges that the defendant Chicago & Alton Railroad Company then and there owned possessed and operated a certain track which constituted a part of its said railroad, and which said track furnished a connection between its said railroad and a certain other rail-
23 road in Chicago aforesaid and upon and over its said track the Chicago Burlington & Quincy Railroad Company and other railroad companies, at the invitation and with the knowledge and consent of the defendant, were, long prior to — then and there *o*ccustomed to operate certain engines and trains of cars. And the plaintiff further alleges that at the time aforesaid, the said — Burlington & Quincy Railroad Company, at the invitation and *at* the knowledge and consent of the defendant, and for a valuable consideration inuring from it to the defendant, was operating one of its The Chicago Burlington & Quincy Railroad Compan*ie*'s said trains upon which the plaintiff was employed as such switchman, upon and over said tracks, which connected defendant's said railroad with a certain other railroad as aforesaid. And the plaintiff further alleges that long prior to the time in question, there was a semaphore, or signal post, placed alongside of and so close to the defendant's said track, *and* said post was likely and liable to crush switchm*a*n against or knock them from the side or sides of cars, while being so operated upon said track past said post, and said post and track remained in such proximity to each other, from thence to and including the time of

the injuries hereinafter complained of, whereby the switchman, employed upon trains which operated over said track as aforesaid, were exposed to great danger of bodily injury, and of all, which facts plaintiff alleges, the defendant, long prior to and then and there knew, or by the excercise of ordinary care in that behalf, would have known but the plaintiff through no want of ordinary care upon his part, did not know of the said position of the said post in
24 reference to said track or the danger incident thereto, and the plaintiff alleges that the defendant also knew or by the exercise of ordinary care in that behalf would have known that plaintiff was so employed upon said track and of the lack of his knowledge of the said position of said post and of the danger incident thereto in sufficient time prior to the said injuries, to have enabled it by the exercise of ordinary care to have notified or informed the plaintiff of the said position of said post and of the danger incident thereto, and it was its duty to have done so, but it negligently failed and neglected to so notify and inform him.

And the plaintiff further alleges that upon the occasion in question, while he, in the discharge of his duty as such switchman, was riding upon the side *on* one of the cars of the said train, upon which he was employed as aforesaid, while it was being operated upon and over said track and *passed* said post and while as he alleges he was exercising ordinary care and caution for his own care and own safety, as a direct result and as a consequence of said dangerous proximity of said post to said track, and of his being uninformed of that fact he was thereby *taken* then and there caught and crushed between said post and the side of said car, and was knocked from the side of said car to and upon the ground there, and by *the* means of the premises the plaintiff sustained and incurred the injuries, disiabilities and loss, damages, pain, suffering and obligations as described and set forth in the or-ginal declaration, as amended, filed herein, and to which said declaration, for a discription of the same he here refers. To the damage of the plaintiff of $30,000.00, wherefore, *to* bring this suit, etc.

JAMES C. McSHANE,
Attorney for Plaintiff.

25 And afterwards to-wit on the 13th day of May A. D. 1911, a certain plea was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

General No. 273,695. Term — 6501.

JOSEPH M. WAGNER
vs.
CHICAGO & ALTON RAILROAD COMPANY.

Now comes the defendant The Chicago and Alton Railroad Company by Winston, Payne, Strawn and Shaw its attorneys, and defend*ants* the wrong and injury, when, etc., and says that it is not guilty of the said supposed several grievances above in the plaintif-'s additional counts heretofore on May 10th 1911, filed her-in, or in either of said additional counts laid to the charge of the said defendant, in manner and *from* as the said plaintiff has in the said additional counts or in either of them alleges against it, and of this the defendant puts itself upon the country, etc.

And for a further plea in this behalf, the said defendant says that it did not own, use, possess, control, direct, lease, manage or operate the track, post semaphore, engine, train, cars or car, appli-
26 ances, machinery, equipment, mechanissms, devices, vehicles, premises, plant or business in said additional counts mentioned as in said additional counts and in each thereof alleged and laid to its charge and of this the said defendant puts itsself upon the Country, etc.

And for a further plea in this behalf said defendant says that it did employ, direct, order, control, or manage the plaintiff, as in said additional counts, and each count thereof alleges, and of this the said defendant puts itself upon the country, etc.

And for a further plea in this behalf, the defendant says that the plaintiff ought not to have *its* aforesaid action against it, the said defendant, because it says that the said cause of action in said additional counts and in each count thereof occur-ed to the plaintiff more tha*t* two years prior to the filing of said additional counts, and this the said defendant is ready to verify, etc., whereupon it prays judgment, etc.

WINSTON, PAYNE, STRAWN AND SHAW,
Attorneys for Defendant.

And *and* afterwards to-wit: on the 15th day of May A. D. 1911, the following proceedings were had and entered in said Court to-wit:

26½ *And afterwards, to-wit, on the 15th day of May, A. D. 1911, the following proceedings were had and entered of record in said Court to-wit:*

273,695.

JOSEPH M. WAGNER
vs.
CHICAGO & ALTON RAILROAD COMPANY.

Case.

This cause coming on to be heard upon the demurerr to the defendant's plea of the statute of limitations to the additional counts of the plaintiff's declaration filed herein, after arguments of counsel and due deliberation by the court, said demurrer is sustained, to which the defendant excepts.

This cause being called for trial, come the parties to this suit, by their attorneys respectively, and issues being joined, it is ordered that a jury come, whereupon come the jurors of a jury of good and lawful men to wit: August Girlason, Peter N. Siemsen, Albert J. Bartelos, Eddy S. Brandt, Fred C. Craig, John Costello, Edward M. Hollesen, Edward Rogers, Alfred E. Munson, George M. Pletcher, Edward G. Hillard and Paul A. Rzeppa who being duly elected, tried and sworn, well and truly to try the issues joined herein, and a true verdict render, according to the evidence and on the agreement of the parties to this cause, now here made in open Court, it is ordered, that juror Edward Rogers be and is hereby excused, and withdrawn, and that the trial of said cause proceed with the remaining eleven jurors, and the hour for adjournment having arrived, it is ordered that said jury be permitted to separate until tomorrow morning.

27 And on to-wit: *on* the 15th day of May A. D. 1911 a certain demurrer was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

General No. 273,695. Term No. 6501.

JOSEPH M. WAGNER
vs.
CHICAGO & ALTON RAILROAD COMPANY.

Case.

And the plaintiff, as to the plea of the defendant thirdly by its above plea to plaintiff's additional counts, filed herein, to-wit: its plea to the statute of limitations says that the same and the matters -herein contained in manner and form as the same are above pleaded

are not sufficient in law to bar him, the plaintiff, from having his aforesaid action, and that he is not bound by law to answer the same, and this he is ready to verify, wher-fore, for want of a sufficient plea in this behalf, the plaintiff prays judgment and his damages, etc., to be adjudged to him, etc.

JAMES C. McSHANE,
Attorney for Plaintiff.

28 And afterwards to-wit, on the 16th day of May A. D. 1911, the following proceedings were had and entered of record in said Court to-wit:

273,695.

JOSEPH M. WAGNER
vs.
CHICAGO AND ALTON RAILROAD COMPANY.

Case.

This day again come the parties to this cause by their attorneys respectively, and the jury impaneled herein also comes and the hour for adjournment having arrived it is ordered that said jury be permitted to seperate until to-morrow morning.

And afterwards to-wit on the 17th day of May A. D. 1911 the following proceedings were had and entered of record in said Court to-wit:

273,695.

JOSEPH M. WAGNER
vs.
CHICAGO & ALTON RAILROAD COMPANY.

Case.

This day again come the parties to this suit by their attorneys respectively, and the jury impaneled herein also comes and the hour for adjournment having arrived, it is ordered that said jury be permitted to separate until tomorrow morning.

29 And afterwards towit, on the 18th day of May A. D. 1911 the following proceedings were had and entered of record in said Court towit:

273,695.

JOSEPH M. WAGNER
vs.
CHICAGO AND ALTON RAILROAD COMPANY.

Case.

This day again come the parties to this cause by their attorneys respectively and the jury impaneled herein also comes and the hour for adjournment having arrived it is ordered that said jury be permitted to separate until tomorrow morning.

And afterwards towit, on the 19th day of May A. D. 1911, the following proceedings were had and entered of record *of* said Court to-wit:

273,695.

JOSEPH M. WAGNER
vs.
CHICAGO & ALTON RAILROAD COMPANY.

Case.

This day again come the parties to this suit, by their attorneys respectively, and the jury impaneled herein, also come and after hearing all the evidence adduced, retire to consider of their verdict to their jury room and the hour for adjournment having arrived, that when said jury shall have agreed upon a verdict herein, they shall reduce it to writing sign, and seal the same, and be permitted to seperate until Monday morning next.

And on the agreement of the parties to this suit now here made in open Court it is ordered that the polling of the jury herein, be and is hereby waived.

And afterwards towit, on the 22nd day of May A. D. 1911, the following proceedings were had and entered of record *of* said Court towit:

273,695.

JOSEPH M. WAGNER
vs.
CHICAGO & ALTON RAILROAD COMPANY.

Case.

This day again come the parties to this suit by their attorneys respectively, and the jury impaneled herein also come, and thereupon the Court instructs the Clerk *and* open and read the verdict which is as follows; towit: We the jury, find the defendant guilty,

and assesses the plaintiff's damages at the sum of Fifteen thousand Dollars and thereupon said jury return their special findings upon the questions submitted to them by the Court as follows: towit, Do you find from the evidence that upon December 15th, 1908, The Chicago Burlington and Quincy Railroad Company, was engaged in interstate commerce, between two or more states, and that plaintiff was injured while employed by it in such commerce?

Answer. Yes.

Whereupon the defendant enters herein its motion for a new trial on said cause.

31 And on towit on the 22nd day of May A. D. 1911 a certain verdict was filed in the office of the Clerk of Said Court in words and figures following to wit:

We the jury find the defendant guilty and assess the plaintiff damages at the sum of Fifteen Thousand Dollars.

AFRED E. MUNSON, *Foreman.*
A. J. BARTELS.
PAUL A. RZENPPE,
EDWARD G. HILLARD.
JOHN COSTELLO.
AUGUST GIRALSON.
GEORGE M. PLETCHER.
PETER N. SWENSEN.
EDDY S. BRANDT.
EDWARD M. HOLLERN.
FRED C. CRAIG.

And on towit on the 22nd day of May A. D. 1911, a certain special findings was filed in the office of the said Clerk in words and figures following to-wit: Do you find from the evidence that upon the fiftheenth of December 1908, the Chicago Burlington and Quincy Railroad Company was engaging in interstate Commerce between two or more states and that plaintiff was injured while employed by it in such commerce. Answer yes or no.

Yes.
Yes Afred E. Munson, Foreman.
Yes, Paul A. Rzeppe.
Yew, Edward S. Brandt.
Yes, A. J. Bartelle.
Yes, George M. Pleitcher.
Yes, John Costello.
Yes, Eddy G. Hillard.
Yes, August Girlson.
Yes, Fred C. Craig.
Yes, Peter N. Swensin.
Yes, Edward M. Hollern.
Yes.

32 And afterwards towit on the 24th day of May A. D. 1911 the following proceedings were had and entered of record in said Court to-wit:

No. 273,695.

JOSEPH M. WAGNER
vs.
CHICAGO & ALTON RAILROAD COMPANY.

Case.

On motion of plaintiff's attorney it is ordered that the defendant file its points herein in writing which it relies on in support of its motion for a new trial heretofore entered in said cause.

And afterwards *on* towit on the third day of June A. D. 1911 the following proceedings were had and entered of record in said Court to-wit.

273,695.

JOSEPH M. WAGNER
vs.
CHICAGO & ALTON RAILROAD COMPANY.

Case.

This cause coming on to be heard upon defendant's motion heretofore entered herein for a new trial, in said cause after arguments of counsel and due deliberation by the Court said motion is overruled, and a new trial is denied to which the defendant excepts.

Thereupon the defendant enters herein his motion in arrest of judgment which motion is also overruled to which the defendant excepts.

$15,000.00.

Thereofor- it is considered by the Court that the plaintiff do have and recover of and from the defendant and his said damages of Fifteen thousand dollars in form as aforesaid by the jury
33 assessed, together with his costs and charges in this behalf expended, and have its execution thereofor to which the defendant excepts,

Thereupon the defendant having entered his exceptions herein prays an appeal from the judgment of this Court to the Appellate Court in and for the first district of Illinois, which is allowed upon filing his appeal bond herein in the sum of Seventeen Thousand dollars to be approved by the Clerk of this Court within thirty fays from this date, and leave given the defendant to file his bill of exceptions herein within ninety days from this date.

And afterwards to wit; on the 8th day of June A. D. 1911 a certain *alleap* bond was filed in the office of the Clerk of said Court in words and figures *in* following towit:

34 *Appeal Bond. Appellate Court.*

Know all men by these presents, That We Chicago and Alton Railroad Company, a corporation of the County of Cook and State of Illinois, and National Surety Company, a corporation of the County of New York and State of New York are held and firmly bound unto Joseph M. Wagner in the penal sum of Seventeen thousand ($17,000.00) Dollars lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents.

Witness our hands and seal this 8th day of June A. D. 1911.

The condition of the above obligation is such, That whereas, the said Joseph M. Wagner did, on the 3rd day of June A. D. 1911, in the Superior Court of Cook County, in the State aforesaid, and of the May term thereof, A. D. 1911, recover a judgment against the above bounden The Chicago and Alton Railroad Company for the sum of Fifteen Thousand Dollars and no cents, besides costs of this suit from which said judgment of the said Superior Court of Cook County, the said The Chicago and Alton Railroad Company has prayed for and obtained an appeal to the Appellate Court, within and for the First District in said State.

Now Therefore, if the said The Chicago and Alton Railroad Company shall duly prosecute its said appeal with effect, and
35 moreover pay the amount of the judgment, costs, interest and damages rendered, against it in case the said judgment shall be affirmed in said Appellate Court then the above obligation to be void, otherwise to remain in full force and virtue.

CHICAGO AND ALTON RAILROAD COMPANY, [SEAL.]
By W. L. ROSS, *V. President.*
NATIONAL SURETY COMPANY, [SEAL.]
By HOMER H. McKEE,
Resident Vice President.

Attest:
T. J. LORNY,
Residene Ass't Secretary.

Attest:
H. E. R. WOOD,
Ass't Secretary.

Approved this 8th day of June A. D. 1911.
CHARLES W. VAIL,
Clerk Superior Court of Cook County.

O. K.
JAS. C. McSHANE,
Attorney for Plaintiff.

35½ And afterwards to-wit, on the 3rd day of August A. D. 1911 a certain Bill of Exceptions was filed in the office of the Clerk of said Court, in words and figures following to-wit.

36 *Index.*

	D.	C.	R. D.	R. C.		
Domenick Lecco.....	2	17	23	26		
John Sweeney.....	31	46				
W. W. Dorsey.....	56	73	99	104		
Julius Szerlinsky....	107	111	112	113	114	
Richard Sweeney....	123	131				
George McCullom...	129	151				
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John Connell.....	161	172	199	207	209	
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Frank Coleman.....	229	234	252	260		
Fred J. Ehrman....	262	278	284	286	288	290
Lawrence Ryan.....	291	299	304	305		
Joseph M. Wagner...	307	394	475	485	502	562
John B. Jack.....	522	535	553	560		
Joseph M. Redfern..	561	597	607	608		
George McCullom (rec)	609	614				
R. W. Bond.....	620	625				
Frederick Barber....	626	632				
Henry Yoerg.....	640	642				
Peter Basoe, M. D...	650	659				
W. A. Van Hook....	669	684				
James Whitney Hall, M. D.....	691	707				
Joseph M. Wagner, (rec)	731	743	751			
A. M. Ahr.....	751	758				

37 STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County, May Term, A. D. 1911.

Gen. No. 273,695.

JOSEPH M. WAGNER
vs.
CHICAGO AND ALTON RAILROAD COMPANY.

Bill of Exceptions.

Filed Aug. 3, 1911. Charles W. Vail, Clerk.

Be it remembered, that heretofore, to-wit, on the 15th day of May, A. D. 1911, being one of the days of said term of said court, this cause came on for hearing before the Honorable John McNutt, Judge of the City Court of Mattoon, in the State of Illinois, sitting as one of the judges of the said Superior Court, at the request of

the judges of said Superior Court, and a jury, whereupon the following proceedings were had:

Mr. James C. McShane appearing for the plaintiff;

Messrs. Winston, Payne, Strawn & Shaw, by Mr. Edward Warren Everett, appearing for defendant.

And thereupon, plaintiff's attorney made an opening statement to the jury of the facts he expected the evidence to show and the issues involved in said case, and thereupon, defendant's attorney asked leave of court to reserve his opening statement until the close of plaintiff's case in chief, to which request and motion plaintiff's counsel then and there objected and moved the court that the defendant be then and there required to make its opening statement to the jury, but the court refused to require the defendant's counsel to make an opening statement to the jury, but permitted
38 him to reserve the same as requested, to which ruling of the court, in so permitting counsel for defendant to reserve his opening statement, plaintiff by his counsel then and there duly excepted.

And thereupon, the plaintiff, to maintain the issues in his behalf introduced the following evidence, to-wit:

DOMINICK LECCO, called as a witness on behalf of the plaintiff, being first duly sworn was examined in chief by Mr. McShane, — testified as follows:

Q. What is your name?
A. Dominick Lecco.
Q. How old are you?
A. About 52.
Q. What is your business?
A. Railroad.
Q. In what capacity? What do you do, are you an engineer or the president or what?
A. No, section foreman.
Q. Section foreman?
A. Yes.
Q. For the Chicago and Alton Railroad?
A. Yes.
Q. You were subpœnaed here—brought here from your work this morning?
A. Yes.
Q. How long have you been section foreman for the Chicago and Alton Railroad?
A. I have been the last time 12 years.
Q. Where is your section?
A. My section starts at 15th street and goes to 35th.
Q. By section foreman, you mean that you are the man that has charge of the gang that takes charge of the tracks?
A. Yes.
Q. Repair them and all that?
A. Yes, repair.

Mr. EVERETT: I object to the leading form of the question.
The COURT: Objection overruled.

39 Mr. McSHANE:

Q. How many men do you employ—how many men do you employ on your section?
A. Sometimes ten, sometimes 12, sometimes 15, and at the last 8 or ten.
Q. Do you know where the Pennsylvania crosses the Santa Fe and Western Indiana tracks?
A. Yes.
Q. That is about the intersection of Grove street?
A. Yes, sir.

Mr. EVERETT: I object to the question as leading.
The WITNESS: What do you say.
Mr. EVERETT: I was not talking to you.
The COURT: The objection will be overruled.

Mr. McSHANE:

Q. What north and south street is closest there?
A. Well 21st, and I call it Stewart avenue——
Q. Where is Grove street, is it east or west of Stewart?
A. It is west.
Q. How close to Stewart avenue?
A. Well it is pretty close there.
Q. How many feet would you say?
A. Oh, about 300 feet, I guess, about, I am not sure of it.
Q. Were all of the Chicago and Alton tracks between 16th street and 35th street under your jurisdiction?
A. Yes.
Q. Was there any other section gang on that section except yours?
A. Except myself?
Q. Your gang?
A. Except my gang.
Q. 16th street, is that north of the place I have spoken of?
A. Yes; it is north of the place.
40 Q. Is 35th street south of it?
A. Yes.
Q. The Chicago and Alton tracks run by there, too, do they?
A. Yes,—oh, yes.
Q. I will ask you to look at this picture,—Dominick, and I will call your attention to a track which I will put a cross mark on, do you know what track that is?

Mr. EVERETT: I object to that question. It is improper in form and suggestive, and counsel instead of allowing the witness to pick it out, has marked it.
The COURT: The objection will be overruled.
To which ruling of the court the defendant by its counsel then and there duly excepted.

Mr. McSHANE:

Q. Do you know what track that is I have marked?
A. Yes.
Q. Has it a name?
A. It is called the Fort Wayne "Y," it is merely called "storage"—called "storage."
Q. Do you see the Grove street track there?
A. Grove street away back up here.
Q. Isn't that part of the Grove street track, Dominick?

Mr. EVERETT: I object to that question. This is his own witness.

The COURT: The objection will be overruled.

To which ruling of the court the defendant by its counsel then and there duly excepted.

Mr. McSHANE: Is that part of the Grove street tracks?
A. Yes, part of the Grove street, yes. This track leads over to Grove street and goes into storage track on main line. That "Y" comes into the main line.
41 Q. The question is is it part of the Grove street tracks?

Mr. EVERETT: I object to it; the witness has already explained it.

The COURT: Let him explain it further.

To which ruling of the court the defendant by its counsel then and there duly excepted.

Mr. McSHANE:

Q. The section crew took care of that track during all of the time you worked for the Chicago and Alton?
A. I did.
Q. You mean your crew?
A. Yes.
Q. How far northeast, that is towards the elevator from this post did you take care of it, up to the switch or where.

Mr. EVERETT: I object to that question as to the form.

The COURT: The question is slightly objectionable.

Mr. McSHANE: Well what point on that track—what part of that track did you cease to take care of, or how far did the part you took care of extend?
A. Clear back to the frog, the Illinois Central frog.
Q. You took care of it up to the Illinois Central frog?
A. Yes.
Q. Can you see the Illinois Central frog on that picture, Dominick, look closely?
A. The Illinois Central frog is away up here (indicating).
Q. Then it doesn't show on that picture?
A. Yes, right here (indicating).
Q. About right here (indicating).
A. Yes.

Q. I will mark it with a letter "A," is that right—is that the Illinois Central frog you speak of?

A. That is the Illinois Central frog.

Q. Beginning from the frog and going in the other direction from the elevator, how far up did you take care of it?

42 A. I never come towards the elevator at all. This track run around up here and go to 16th street, the storage track.

Q. How far beyond this post in the direction of the elevator did you take care of the track?

A. The post is right here?

Q. Yes.

A. Right between this frog and this frog. This is the "Y" right here, the post is right in here (indicating).

Q. You say that you took care of this track back to this Illinois Central frog. Now then, going in the other direction, how far did you take care of the track, the whole north of it?

A. North of it, yes.

Q. How long is it from this frog in the other track?

A. I don't know; I couldn't tell about it. I think it is about—

Q. Do you mean away up to the far end of the track of the Chicago & Alton?

Q. Yes.

A. About 50 rail lengths. It is more than that; it is over 50 rail lengths.

Q. Then you took care of this track on both sides of that post?

A. No——

Mr. EVERETT: I object to the question, wait a minute—as to form. I will withdraw the objection.

Mr. MCSHANE: I don't mean on both sides, I mean lengthwise of the track from the Illinois Central frog that we have marked here "A" on the picture up to the post and beyond the post, you took care of it?

A. On one side.

Mr. EVERETT: I object to the form of the question.

The COURT: The objection will be overruled.

43 Mr. MCSHANE:

Q. What did you take care of?

A. I took care of this part. This "Y." It goes around here to the Illinois Central. I don't go no further than this one. I turn back north of the frog, right back here, and around here, this track going right through to 16th street.

Q. From this Illinois Central frog here marked "A" this track runs north, don't it?

A. Yes.

Q. How far—how long was the track from that frog north or northeast, that you took care of—clear around?

A. Clear around, yes, the far end of the track as far as the C. & A. goes in—as far as it goes.

Q. How far is that?

A. I told you, over fifty rail lengths. I never measured it.

Q. It is over 50 rail lengths from the Illinois Central track to the end of the track?

A. Yes, sir.

Q. And you took care of that track?

A. Yes, sir.

Q. Now, I will call your attention to a diagram here—a blue print. This photograph that I have been speaking of I will refer to as Plaintiff's Exhibit "A" for identification. I now call your attention to a plat which we will call Plaintiff's Exhibit B for identification. You see that same track on this plat, don't you?

Mr. EVERETT: I object to that question, if he is going to use the plat, which was probably made by an engineer. It ought to be properly identified first.

44 The COURT: The objection will be overruled.

To which ruling of the Court the defendant by its counsel then and there duly excepted.

Mr. MCSHANE: We are going to prove the plat later.

Mr. EVERETT: I object to the form of the question.

Mr. MCSHANE: Can you find the track shown in the picture on this plat.

Mr. EVERETT: I object to that.

The COURT: Objection overruled.

To which ruling of the court the defendant by its counsel then and there duly excepted.

A. I can't find the track; there are so many roads.

Mr. MCSHANE: Right here.

Mr. EVERETT: That is objected to.

The COURT: The objection will be sustained as to that.

Mr. MCSHANE: Up here north of the Santa Fe crossing, no.

A. The Santa Fe crosses over the C. & A.

Q. What is that road there (indicating)?

Mr. EVERETT: I object. The witness ought to be able to identify the plat first and show that he has some knowledge of it.

A. That is the C. & A. track.

The COURT: If the witness can identify *him* he can ask him.

Mr. MCSHANE: Is that track that I am indicating now, with my finger, is that the same track that is shown on the photograph or not?

A. Yes; that is the same track right there, yes.

Q. I am going to put a cross here, Dominick, on that track now, that is the one you mean, is it?

A. Yes; that is the one I mean.

Q. Does that diagram show the position of the tracks about *the* right?

A. Yes; pretty near right—about right. The tracks go right through there, yes. The Santa Fe crosses over both C. & A. tracks.

45 Q. Referring again to the photograph, you will see a white pole here on the right hand side of that circular track, what is that pole?

A. That is the interlocking business.

Q. Is that pole still there?

A. That pole is still there, yes.

Q. How long has that pole been in its present position to your knowledge?

A. How long is that pole there?

Q. Yes.

A. I don't know, I find it there when I started to work and he is still there. I never saw it moved.

Q. It is in the same position now that it was when you went there?

A. Yes; same position now.

Q. And the track is in the same position now as when you went there?

A. Yes, can't move the tracks because it is a short track, short connection, and you can't throw it no way in or out.

Mr. McSHANE: I move to strike that out as not responsive.

The COURT: Yes; the answer will be stricken out.

Q. Do you keep account, Dominick, of the particular tracks that your men work on or do you charge it up generally?

A. Charge it up generally.

Q. Did you make any different charges in reference to the work that you did on this track than any other track in your section?

A. No.

Q. All the same?

A. No.

Q. And that has been so for 12 years?

A. Yes.

Q. Look at that picture again, the one that I first showed you as plaintiff's exhibit A for identification, is that a correct picture of those tracks at that place?

Mr. EVERETT: I object to it. He has not laid the proper foundation and he has not fixed the time.

46 Mr. McSHANE:

Q. During all of the 12 years that you were there, is that the picture of the position of those tracks?

A. Yes sir.

Q. And all of the tracks?

A. All of the tracks, yes; they never change.

Q. There has never been any change in any of them to your knowledge?

A. No.

Q. And they are all correctly shown in the position in the picture?

A. Yes.

Q. In going from the Pennsylvania tracks over to the Erie, would a crew use any other part of this Grove street track except the part shown in this picture?

Mr. EVERETT: I object to that question, as to its form.

A. Yes.

The COURT: Sustained.
Mr. EVERETT: I move to strike out the answer.
The COURT: The answer will be stricken out.
Mr. MCSHANE: All right strike it out.

Q. What kind of cars, if any, have you seen using that track, that circular track around north of the post?
A. I have seen every kind of a car.
Q. Have you seen the crews of various railroads using it, many railroads?
A. Any railroads passes by each time they transfer.
Q. I could not get that; I could not understand it. Was that track used by nearly all the roads?
A. Yes.
Q. Was it that way all the time while you were there?
A. Yes.
Q. For all kinds of cars?
A. Yes.
Q. Do you know whether or not the Chicago and Alton had a man there to keep track of the cars that went over it?

47 Mr. EVERETT: I object to that.

A. No.

Mr. EVERETT: I will withdraw the objection.

Mr. MCSHANE:

Q. Do you know whether or not the Chicago and Alton kept a man there to keep track of the cars that went over it?

Mr. EVERETT: The witness answered that; he said no.

Mr. MCSHANE: All the other roads?
A. They have got a man about 200 feet away from there that checks that.

Mr. EVERETT: I move to strike that answer out; it is a conclusion.
The COURT: It is not responsive to the question; it is stricken out.

Mr. MCSHANE: To check cars that went over this track?
A. Yes.

Mr. EVERETT: I move to strike that out. Please do not answer so quickly. The question is whether the Chicago and Alton road had a man there to do this?
Mr. MCSHANE: You withdrew it.
The COURT: The form of the question was objectionable at that time and the court sustained that.
Mr. MCSHANE: Let it all go out.

Q. Did the Chicago and Alton—and by the way, when we refer

to the C. and A. and Alton and Chicago and Alton we mean this defendant, that will be understood?

Mr. EVERETT: Yes; all right.
Mr. MCSHANE: The witnesses, when they refer to it——
Mr. EVERETT: I presume they do.
Mr. MCSHANE: May it be so understood.
Mr. EVERETT: Yes.

48 Mr. MCSHANE: Did the Chicago and Alton have any other tracks connecting the Pennsylvania with the Western Indiana except this track shown in the picture?

Mr. EVERETT: I object to that question.

A. No.

The COURT: The objection will be overruled.
To which ruling of the court the defendant by its counsel then and there duly excepted.
Mr. EVERETT: The objection is that it calls for the conclusion of this witness as to the ownership of that track.
Mr. MCSHANE: I do not care about his conclusion that they owned this track, your honor.
Mr. EVERETT: That is the way you put the question, and that was my ground of objection.
The COURT: The objection will be sustained if that is the form of it.
Mr. EVERETT: I move to strike out the answer on that ground.
The COURT: It will be stricken.

Mr. MCSHANE: Was there any other track in that neighborhood that the Chicago and Alton crew took care of that connected the Pennsylvania with the Western Indiana except this track shown in the picture?
A. Just that one, yes.
Q. Just that one?
A. Yes.
Q. What is the gauge of that track, Dom-ick?
A. Four foot eight and a half.
Q. Standard g*ua*ge?
A. Yes.

49 Cross-examination.

By Mr. EVERETT:

Q. The track you took care of extended from 16th to 35th, did it?
A. Yes.
Q. That is nearly two miles, isn't it?
A. Three miles—over three miles.
Q. From 16th to 35th?
A. Yes.
Q. Over the Three miles?

A. Yes, sir; the mile post is just this side of the park there. The first at 22nd, and one is at——

Q. Don't you know it is only three miles from Madison street to 39th?

A. Three miles.

Q. Yes.

A. I don't know. I see the mile post there. I never measured it. They have got a mile post there.

Q. You took care of the crossings, did you?

A. Yes, sir—no, the crossing—just the C. & A.

Q. Where that track is crossed by other railroads.

A. No; I don't take care of no crossing, just the track.

Q. Do you take care of the switches?

A. No switch there where there is a track.

Q. Are there any switches on the track that you take care of from 16th to 35th?

A. Oh God, yes, about 300 switches.

Q. Did you take care of the switches?

A. Yes.

Q. Some of those switches belong to other railroads, don't they?

A. The part no.

Q. The part no?

A. The rest of the tracks, no. All the switches belong to the C. & A.

50 Q. You see this curved track that was shown you on Plaintiff's exhibit A for identification, that is known as the Fort Wayne "Y" is it?

A. Yes; Fort Wayne "Y".

Q. That shown here by the cross?

A. Yes.

Q. That is the Y that runs into the Fort Wayne railroad?

A. Went into the Fort Wayne, Western Indiana, went in all over ther-. The Santa Fe got across, or do you mean give a sign whenever they want to go across it?

Q. Hown long is that track form point A in this picture to Point B?

A. Well that is 250 feet.

Q. Do you know what railr-ad owns this straight track running along here?

Mr. McSHANE: I object to the ownership, your honor.

The COURT: The objection is sustained.

Mr. McSHANE: He can say what they are called.

Mr. EVERETT: Exception to the ruling.

To which ruling of the court the defendant by its counsel then and there duly excepted.

Mr. McSHANE: I do not object to his saying what they are called.

Mr. EVERETT: Do you have anything to do with this straight track over here?

A. No.

Mr. McSHANE: The track you speak about wasn't one of the Alton tracks, was it?

Mr. EVERETT: I don't know.

Mr. McSHANE: If it is anything about the Alton tracks, I do not object to his saying anything whether the Alton owns that or not. I took it that it was one of the other tracks, not the Alton, and that is why I objected to the ownership. An Alton track, I have no objection to his saying whether the Alton owns it or not.

51 Mr. EVERETT: You have never made any repairs on this track between A and B, the track marked with a cross, have you?

A. Kept it in repair, but never changed.

Q. Did you ever do anything to it yourself?

A. No.

Q. No one ever told you to do that?

A. No.

Q. You took care of this track running along straight, didn't you?

A. Yes.

Q. Marked "D"?

A. Yes.

Q. That is the track you have reference to when you said you and you- gang kept it in repair, that track there marked "D"?

A. Yes.

Q. And that is referred to on Plaintiff's Exhibit "A" for identification.

(No Answer.)

Q. This post has been there for how many years that you know of?

A. I know 12 years the 10th of May, this month—the 10th of this month is 12 years right there I find the post.

Q. That post has been there at least 12 years in the same position?

A. Yes.

Q. And you say they cannot put it any other place because the tracks come together at that place, is that what you said?

A. Yes.

Mr. McSHANE: I object to that.

The COURT: Sustained.

Mr. McSHANE: That goes out does it.

The COURT: The answer may be stricken out.

Mr. EVERETT: Exception to the ruling.

To which ruling the defendant by its counsel then and there duly excepted.

52 Mr. EVERETT: That pole is a part of the interlocking system isn't it?

A. Interlocking system, yes.

Q. That control- the track shown in the picture?

A. Yes; he has got a target ther-. Every time he has got to get a target.

Q. The man up in the house.

A. The towerman.

Q. The train crew give him a signal, do they?

A. That is the signal. The train crew, they get the target below——

Q. The train comes up there and give the signal where they want to go?

A. Yes—no, the train — give the signal and the man in the tower gives the target. If he wants to go to the C. & A. there, he give- the target for C. & A.

Q. The man in the tower doesn't know where the trains wants to go until somebody tells him?

A. When he sees the train he knows where they want to go, I guess.

Q. Don't the conductor give him a signal where they want to go?

A. They have got a button on the other end of the yard where they want to go.

Q. The- signal by a button.

A. Yes.

Q. When they come up to the switch, he throws the switch from his tower?

A. Yes.

Q. And the conductors on the train push the button, do they?

Mr. McSHANE: Wait your honor, I object to that.

The COURT: If he knows, he may answer, but it is not cross examination.

Mr. McSHANE: I put it on this ground——

Mr. EVERETT: It is as to the situation there, about this pole and its use.

53 The COURT: If you put it on the ground that it is not cross examination, the objection will be sustained.

Mr. EVERETT: Exception to the ruling.

To which ruling of the court the defendant by its counsel then and there duly excepted.

Mr. EVERETT:

Q. You didn't see this picture taken did you?

A. No.

Q. You didn't take it?

A. No.

Q. Do you know when it was taken?

A. No.

Redirect examination.

By Mr. McSHANE:

Q. Look at this straight track at the right ahand side of that post in the picture, plaintiff's exhibit A for identification, this gentleman asked you if you kept that straight track in repair, and you said yes.

Mr. EVERETT: Don't answer it, please, yet.

Mr. McSHANE: Is that right.

Mr. EVERETT: I object to that question, as to its form and its substance as well.

The COURT: The objection will be overruled.
Mr. EVERETT: Exception.
To which ruling of the court the defendant by its counsel then and there duly excepted.

Q. I now refer to this straight track that he put the "D" on, that is on the opposite side of the pole, from the curve of the track that I spoke about, did you keep that track in repair too?

Mr. EVERETT: I object to that question, as to its form.
Mr. MCSHANE: Do you say he did?
Mr. EVERETT: He said he did keep the straight track, yes.

54 Mr. MCSHANE: About this curved track again, this one with the cross marked upon it, running form the Illinois Central frog down to where you have told us?
A. Yes.
Q. Did you make repairs on that once in awhile?

Mr. EVERETT: I object to that question in its form.

A. When it needed it.

Mr. EVERETT: I move to strike that out; it is not redirect examination.
Mr. MCSHANE: The witness evidently meant that he did not change the track from its position.
The COURT: It is objectionable as to form.
Mr. EVERETT: The answer is stricken out?
The COURT: Yes, the answer is stricken out.

Mr. MCSHANE: What work did you do, if any, on that curved track that I have marked with the cross during the 12 years that you worked there?

Mr. EVERETT: I object to it, the witness said he didn't do any in answer to my question.
The COURT: He may answer.

A. I put in ties. Sometimes there are rotten ties and they needed repairs, just ties, and spiked where they needed repairs.
Mr. MCSHANE: You made all of the repairs that were ever made on the track during the 12 years?
A. Yes.

Mr. EVERETT: Objected to the question as to its form.
The COURT: Overruled.

55 Mr. MCSHANE: What you meant was that you did not change the track from its position?
A. Yes, sir.

Mr. EVERETT: I object to that.
The COURT: The objection will be sustained as to that.
Mr. EVERETT: I move to strike out the answer.
The COURT: Yes, strike out the answer.

Mr. MCSHANE: This curved track runs into and is a part of the Grove street track, isn't it?

Mr. EVERETT: I object to that question as leading and suggestive.
The COURT: The objection will be sustained as to that.

Mr. MCSHANE: It is coupled on to connect with the Grove street track?

Mr. EVERETT: I object to that; the witness ought to describe it as he has already done on his direct examination.
The COURT: He may answer again if he has answered once.
To which ruling of the court the defendant by its counsel then and there duly excepted.

Mr. MCSHANE: Is it connected with the Grove street track?
A. Certainly, yes.

Recross-examination.

By Mr. EVERETT:

Q. Do you remember of any time that you made any repairs by putting in ties on that track marked "X" on plaintiff's exhibit 1? Do you have any specific recollection?
56 A. Just wait a minute now, I don't want to get that mixed up.
Q. I asked you if you remembered it.
The COURT: Just answer the question.
Mr. EVERETT: I asked you if you remembered of any time—any one time now that you have put in any ties on that track marked X, do you remember of any times that you put in the ties.
A. Yes.
Q. When?
A. I put ties there this spring, too. I put five or six ties there. There were rotten ties.
Q. In what part of that track did you put them?
A. Right here.
Mr. MCSHANE: He is indicating the track at the cross marks.
Mr. EVERETT: Before this accident, do you remember—before December 18, 1908—do you remember of any time you put any ties in there?
A. I put in ties about a year ago, too.
Q. I am asking you before December 18th, 1908. Do you remember any time before 1908 that you put in ties there? I am asking if there was any time that you did it.
A. None that we didn't need, I didn't put no ties in there.
Q. Do you remember any time prior to December, 1908, that you put in any ties on this track marked "X" or that you tightened up any bolts or made any repairs on it?
A. Yes; I tightened the bolts.
Q. When?
A. I tightened the bolts in 1908.

Mr. EVERETT: I move to strike out the answer as not responsive.
The COURT: The answer will be stricken.

Mr. EVERETT: My question is before 1908, do you remember of any one time that you did anything to that track before 1908?

A. Yes.

Q. When?

A. Well, whenever it would need any repairs I suppose——

57 Q. Not what you suppose, I am asking you if you remember any time that you did?

A. Yes.

Q. When?

A. 1907 and 1906. I have got to go around there when they need the repairs. I have got to go around there and I have got to repair it.

Mr. EVERETT: I move to strike that out. I am asking him if he remembers it.

Mr. MCSHANE: That he did it — 1906 or 1907 is competent. Whether they needed it or not I don't care.

The COURT: That portion of the answer pertaining as to whether or not the track needed repairs will be stricken.

Mr. MCSHANE: Bu- the fact that he did do the work remains.

The COURT: Yes.

Mr. EVERETT: When did you do the repairs in 1907—when did you do that?

A. About the month of April.

Q. What did you do in the month of April 1907?

A. I put in two ties and I put the bolts. The ties got rotten, about eight or tem ties.

Q. Are you working for the Chicago and Alton now?

A. Yes.

Q. Who asked you to come here and testify?

A. This gentleman here, this subpœna.

Q. Who, Mr. McShane?

A. Yes.

Q. Where did you go, up to his office?

A. No; he told me to come up here.

Q. Did you go to his office?

A. No, sir.

Q. Where did you see him first? Where did you see him?

58 A. I seen him come out to the track one day to see me—to see whether I worked for the Chicago and Alton, and I say yes.

Q. Which man say your?

Mr. MCSHANE: Ray, is that the name?

A. Mr. Ray.

Mr. EVERETT: I object to this interruption when I am cross examining the witness.

The COURT: The objection will be sustained.

Mr. EVERETT: I take an exception to conduct of counsel.

To which conduct of counsel the defendant by it- counsel then and there duly excepted.

Re-redirect examination.

By Mr. McSHANE:

Q. Do you see the man there that subpœn-ed you?
A. The man that brought the subpœna?
Q. Yes.
A. Not here.
Q. You saw him in the hall, didn't you?
A. Yes.
Q. Is it this man Ray?
A. I believe the man's name is Ray. I don't know. I don't know very well the name.
Q. He took you from your work?
A. Yes.
Q. Brought you right here?
A. Yes, sir.
Q. Did you take care of all the Chicago and Alton tracks between 16th and 35th street, side tracks, too?

Mr. EVERETT: I object to that; he has been all over that.

A. I took care of all, yes.

The COURT: He has answered, go on.
Mr. EVERETT: Exception to the ruling.
To which ruling of the court the defendant by his counsel then and there duly excepted.

59 JOHN SWEENEY called as a witness on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. McShane and testified as follows:

Q. What is your name?
A. John Sweeney.
Q. How old are you?
A. 36.
Q. What is your business?
A. Clerk C., B. & Q. railroad.
Q. In what department?
A. Super-tendent's office, Chicago division.
Q. Whereabouts is your place of work?
A. 16th and Canal.
Q. What if anything did you have to do as to taking care of the bills rendered to your company by other companies for the use of the other company's tracks along in 1908?
A. I investigated the bills rendered against the C., B. & Q. railroad for the use of tracks in the Chicago terminals.
Q. By any and all railroads?
A. By any railroad—all railroads.
Q. Do you — whether or not during December, 1908—whether the Chicago and Alton railroad company rendered a bill to the C., B. & Q. railroad company for the use of *nay* tracks?

A. I received a bill for the use of their tracks for the month of December—the bill was received I think some time in January.
Q. Was ther- more than one bill in that month?
A. Only one bill.
Q. Have you that bill with you?
A. Yes, sir.
Q. Let me see it, please. You were subpœn-ed to bring this here, weren't you?
A. Yes.
Q. What are these papers in their order—just tell us in a
60 general way.

Mr. EVERETT: I object to that; the papers speak for themselves.
Mr. MCSHANE: Well that is true then, all right.

Q. Look*ing* at this document I now hand you, and state whether or not this — the bill rendered to your company for that month of December?

Mr. EVERETT: I object to that. The question is suggestive and leading.
Mr. MCSHANE: Is that the bill you referred to?

A. It is.
Q. When did you first see that bill, Mr. Sweeney? Just take out this bill—when did you first see that bill and what did you have to do with it—the bill rendered by the Chicago and Alton?

Mr. EVERETT: I object to that, the form of question, and he has not stated that the bill was rendered by the Chicago and Alton.
Mr. MCSHANE: He didn't say so, but it makes no difference.

Q. When did you first see this bill?
A. I certified to that bill on April 7, 1909.

Mr. EVERETT: I move to strike out the answer as not responsive.
Mr. MCSHANE: I am only the one that can object to its not being responsive, your honor, I think that is competent.
The COURT: Read the question.
(Question read.)
The COURT: It may stand.
To which ruling of the court the defendant by its counsel then and there duly excepted.

61 Mr. MCSHANE: What do you mean by certifying to it?

A. That I considered it correct and passed it for payment.
Q. Are your initials or is your signature on anything there?
A. My signature is on there.
Q. Where is it?
A. It is in this left hand corner*ed*.
Q. Checked by J. J. S. for C., B. — Q. R. R. Co."?
A. Yes.
Q. 4/7/1909?
A. Yes.
Q. Did you write that?
A. Yes.

Q. At the time?
A. Yes.
Q. In the regular course of business?
A. Yes.
Q. When did you get the bill? How did it happen to come into your hands?
A. I am in charge of the department. I handle all the bills rendered against the C., B. & Q., and when it is received at the office it will be referred to my department.
Q. And it came to your hands in that way?
A. Yes.
Q. And then when you certified to its correctness, what else did you do, what did you do?
A. I then passed it for voucher.
Q. What do you mean by that?
A. That a voucher would be rendered to pay the Chicago and Alton railroad.

Mr. EVERETT: I move to strike that out.
Mr. MCSHANE: I don't care about that. He passed it for voucher that will be enough.
Mr. EVERETT: The rest may go out?
The COURT: The remainder of the answer will be stricken.

62 Mr. MCSHANE: Was any correction made of anything, Mr. Sweeney? Do you remember any details of the occurrence?
A. There was a bill rendered, there was a statement rendered us by the Chicago and Alton. The statement was not correct. The statement was returned to the Chicago and Alton for correction. They corrected and then rendered the bill.
Q. And this is the bill?
A. That was the bill that was rendered.
Q. What was there wrong with the original bill, do you know.

Mr. EVERETT: I object to it.
Mr. MCSHANE: I don't care about that, this is the correct one.

Q. Now when you *referred* that for voucher, when did you next see it or the voucher?
A. I——
Q. Do you know what that is that you have in your hands?
A. That is the voucher rendered for payment to the Chicago and Alton Railroad by the C. B. & Q. railroad.
Q. Rendered or in payment?
A. For payment.
Q. For payment of what, of this bill?
A. Of that bill, yes.
Q. Is your signature on this voucher?
A. No; my signature is not here. As the voucher is shown correct by the superintendent.
Q. Do you know whether or not that is the superintendent's signature?

A. That is the superintendent's signature.
Q. Do you know his signature?
A. Yes.
Q. And he signs in that way in the regular course of business?
A. Yes.
Q. Are there any other signatures on ther- or memorandum that you know?
63 A. The bill has been approved by the——

Mr. EVERETT: We object to that.
The COURT: The objection is sustained. Answer the question.
Mr. MCSHANE: Do you find any other—whose signature is this down here "approved"?
Mr. EVERETT: I object to that; that is not the way to prove a document.
The COURT: The objection will be sustained.
Mr. MCSHANE: Exception.
To which ruling plaintiff then and there duly excepted.

Q. Whose signature is that?
A. That signature is the signature H. D. Judson, general superintendent of the C. B. & Q.
Q. Do you know whether that is his signature?
A. Yes.
Q. Are you acquainted with it?
A. Yes.
Q. And these two, this bill, this statement, and this bill is in the custody of the Burlington Road, is that right?
A. Yes.
Q. And when you were subpœn-ed you brought this down here?
A. Yes.
Q. What are these other—these letters—were they with the bill when it was first rendered, or what about that? Explain those things?

Mr. EVERETT: I object to it, the letters speak for themselves.
64 Mr. MCSHANE: Maybe they do, but I don't know whether they do or not.
Mr. EVERETT: It is an improper question. That is the ground of my objection.

Mr. MCSHANE: Were there any of those letters that you have in your hands that accompanied either the bill or the voucher?
A. The correspondence is that which passed between the C., B. & Q. and Chicago and Alton in regard to the original statements.

Mr. EVERETT: I object to this telling the contents of the correspondence.
The COURT: Let him complete the answer. That portion would be stricken, but he may have something else in it.

Mr. MCSHANE: Finish your answer.
A. The original statement was not correct and it was returned to

the Chicago and Alton, and there was correspondence in regard to that. They then corrected it and returned it to be certified to.

Mr. EVERETT: I move to strike the answer out.
The COURT: Yes, it will be stricken.
Mr. MCSHANE: I don't care about that.

Q. This correspondence, did that come with the bill when you had it?
A. No; the bill was rendered after it was found, after they corrected the statement.
Q. Then this correspondence did not come into your hands, is that right?
A. Yes; it all came into my hands, but before the bill was rendered.
Q. This correspondence came in with the first bill?
A. With the first statement.
Q. What came with the first statement—is your signature here?
65 A. No; my signature is not on that one. That statement was certified to by one of the clerks in the department. I was off duty at that time.
Q. Do you know the signature of the clerk?
A. I do.
Q. Who is he?

Mr. EVERETT: I object to it as immaterial. It is not the way to prove a record.
The COURT: He may answer.
To which ruling of the court the defendant by its counsel then and there duly excepted.

Q. Do you know the signature?
A. Yes.
Q. Whose signature is it?
A. "R. J. S." R. J. Sweeney is the clerk's name.
Q. Do you know those are his initials and his own writing?
A. I do.
Q. Is that in the regular course of business?
A. Yes.
Q. This paper that I now have in my hand is entitled "Chicago and Alton Railroad Company"——

Mr. EVERETT: I object to this, the paper speaks for itself.

Mr. MCSHANE: I will call this plaintiff's exhibit "F" at this time I will offer in evidence the bill rendered by the Chicago and Alton Railroad Company which this gentleman identifies and said he certified as correct; but before I do that, let me ask this—this bill for trackage on engine and cars passing over Grove street, Chicago. Do you know this track? I am now referring to plaintiff's exhibit "A" for identification. Do you — where the track is that is mentioned in this bill?

66 (No answer.)

Q. I have a plat here, maybe that will be better. What is the track that is referred to there?

A. In the bill?

Q. Yes.

Mr. EVERETT: I object to it. The reference in the bill itself states that, doesn't it? I have not seen it yet.

Mr. MCSHANE: No; the bill says——

Mr. EVERETT: Wait a minute, it is not in evidence yet, let me see it.

Mr. MCSHANE: Over Grove street. Do you know whether or not there was a track at that time connecting the Pennsylvania and the Western Indiana in the vicinity of Grove street?

A. I do, as C. B. & Q. trains use that track in making deliveries to what we call—going to the Chicago and Erie Railway. They went over the P. F. W. & C. and the Chicago and Alton, and then go on to the Western Indiana tracks, and then on to the Chicago and Erie.

Q. The P. F. W. & C., you mean Pennsylvania, don't you, that is the same thing, isn't it?

A. Yes.

Q. Do you know whether or not the Chicago and Alton rendered bills to the Burlington for the use of that track before this bill?

Mr. EVERETT: I object to it.

The COURT: Objection sustained.

Mr. MCSHANE: Only your honor, showing the prolonged course of business, that they used it and paid for it.

Mr. EVERETT: You have not identified the tracks.

Mr. MCSHANE: I will identify the tracks.

The COURT: Ask the question in that form.

67 Mr. MCSHANE: What is the fact as to whether or not—how long were you connected with the Burlington in that department?

A. I worked in that department about—close on to five years I think.

Q. During that time did you have charge of the bills that you speak of?

A. Yes.

Q. What is the fact during that five years and before this accident as to whether or not the Chicago and Alton did render bills from time to time to the Burlington road for the use of this track that you have spoken of?

Mr. EVERETT: I object to that as calling for a conclusion of this witness. It is a matter about which he has not shown any knowledge at all. All he knows is that he has signed some bills, but he don't know who rendered them.

The COURT: The objection will be overruled.

To which ruling of the court the defendant by *his* counsel then and there duly excepted.

Mr. McSHANE: Confine your answer to the bills you know of yourself.

A. I received bills—I might say almost every month there was a bill rendered for the use of this track.
Q. It came in the regular course of business like this bill?
A. Yes.
Q. And from the Chicago and Alton to the Burlington is that right?
A. Yes.

Mr. EVERETT: I object to that form of question and move that the answer be stricken out.
The COURT: Overruled.
To which ruling of the court the defendant by *his* counsel then and there duly excepted.

68 Mr. McSHANE:

Q. Did the Chicago and Alton have more than one track at this place?

Mr. EVERETT: I object to that as calling for the ownership of the railroad.

Mr. McSHANE: Do you know whether they had any more than one track that they had ever rendered a bill to the Burlington for the use of?
A. We never received bills but for one track and that was for the Grove street track.
Q. The track making the connection you have spoken of?
A. Yes.

Mr. McSHANE: Now I will offer this bill in evidence, your Honor.
Mr. EVERETT: I have not seen it.
Mr. McSHANE: That is the original bill.
Mr. EVERETT: I object to it on the ground that there is no proper identification made or connection showing that the track spoken of by the witness is the track mentioned in this bill. This bill says "Passing over Grove street."
The witness has not identified the track at Grove street.
Mr. McSHANE: I will ask you whether this track you have spoken of is the one mentioned in the bill.
Mr. EVERETT: I object to that, let the witness do the testifying.
Mr. McSHANE: What track is this track referred to, "passing over Grove street"?

A. It is the track connecting the Chicago and Alton and the Western Indiana with the C. B. & Q. used in going to the Chicago and Erie Railroad?
A. Is that the track you have been speaking of heretofore?
A. Yes.

69 Mr. McSHANE: Now I offer that in evidence.
Mr. EVERETT: I object to it on the grounds that I have already mentioned. There is no proper identification and it is not

shown that this witness had any knowledge of the bill or where it came from.

The COURT: Objection overruled.

To which ruling of the court the defendant by its counsel then and there duly excepted.

Mr. MCSHANE: Mark that Plaintiff's Exhibit F.

Said bill so offered was admitted in evidence and marked Plaintiff's Exhibit F and is attached hereto at page 117*a*.

Mr. MCSHANE: I will now offer this voucher issued by the Burlington road in payment of that bill.

Mr. EVERETT: I object to it because there is not proper identification made of the voucher, showing who made it, or what was done with it after it was made; nor is it shown that it has ever gone into the possession of the Chicago and Alton Railroad.

Mr. MCSHANE: I will bring the whole force in here if you want to be so technical upon it. I will ask the court to rule on this voucher for the present. I don't know whether this man knows it or not.

Q. Do you know whether or not this endorsement on the back "H. E. K. Wood" for the Alton are you familiar with that?

Mr. EVERETT: I object to that. On its face it is a stamp and it cannot be anybody's signature.

A. I have never seen it before.

Mr. MCSHANE: All right, we will bring the other people in on the voucher.

70 Cross-examination.

By Mr. EVERETT:

Q. You didn't keep any record of the cars that passed over this track you are talking about yourself, did you?

A. No; they came in the office.

Q. You didn't keep it yourself?

A. No; not personally.

Q. You didn't keep the records?

A. No.

Q. The record of those cars is made out by some man that stood out there and checked the cars as they went over this piece of track you are talking about, that is the way the record is made, isn't it?

A. No; our record is made up from the bills and other documents.

Q. What other documents?

A. For instance, like we have, like we call the switchman's report.

Q. That is your switchman's report over what track he has passed other than his own?

A. Yes, he would.

Q. And you used that to make up your reports?

A. Yes.

Q. And that is recorded in a book, isn't it?
A. Yes.
Q. That book is in your department?
A. Yes.
Q. Who keeps that book?
A. That is the property of the office.
Q. What man writes in it? What man makes the entries?
A. We call him a car record clerk.
Q. What is his name?
A. There are several there. I could not tell just who done that—kept the record of that one.
Q. The switchman's record is the original record made of the cars that pass over the track that is true, isn't it?
(No answer.)
Q. That is the first record that is made?
71 A. No; the first record would be taken from bills.
Q. Doesn't that switchman put in his switchman's book the number of cars he took over a given track?
A. Yes.
Q. And that applies to this track you are talking about at Grove street, doesn't it?
A. Yes.
Q. Then he brings that in in the evening and turns it in, doesn't he?
A. Yes.
Q. To the car clerk?
A. He turns into to the general yard master's office and then it is afterwards turned over to the superintendent's office where the car clerks are.
Q. So the car clerks who keep the record of these cars are not in your department at all, then?
A. They are in the same department—same office.
Q. They are in a different branch of the superintendent's office that is true, isn't it?
A. We consider it the same department; it is all one.
Q. You haven't anything to do with the car clerks have you?
A. No; they are not——
Q. Not under you in any way?
A. I have no supervision over them.
Q. What is your job; what are you designated?
A. I investigate all bills—all trackage and switching bills rendered against the C. B. & Q. by other railroads.
Q. When a bill comes in it is passed along to you?
A. Yes.
Q. Who gets it first?
A. The mail clerk will get it first and he will put it in the channel——
Q. From the mail clerk where would it go?
A. It would reach my desk first.
Q. Reach your desk right away.
A. Yes.

Q. And then you would start out to look up your records to see whether or not the man of your company had made such a record of such cars?

72 A. Yes.

Q. So that the only way you know it is correct is by comparing the bill that is rendered with your own records?

A. Yes.

Q. And those records you have not got here today, have you—the records of your company?

A. No; I didn't bring that record.

Mr. EVERETT:

Q. You don't prepare those vouchers, that are prepared, do you?

A. They are prepared in——

Q. I said you did not prepare them?

A. No sir.

Q. That is done by some one else?

A. No, sir, I did not——

Q. The fact is, you never saw this voucher that you identified, until you went to look up your own records, in answer to this subpœna, isn't that true, that is the first time you ever saw that voucher, isn't it?

A. Yes, I did not make up the voucher.

Q. No, and the only way you know anything about the voucher is to compare it with other documents, and it seems to cover the same charges?

A. With the——

Q. With the bill?

A. The voucher was made out to cover that bill.

Q. But you did not make it out?

A. No sir.

Q. You only know that because they look alike, that is, the description of the charge is the same, that is the only way you know it, isn't it?

A. There is a reference, I believe.

Q. Isn't that the only way you know it?

73 *Q.* No, I know it by reference, I believe, given in the voucher there, showing that it covers that bill.

Q. You made that reference yourself?

A. No, that is made by the clerk, I believe.

Q. Somebody else made that record?

A. Yes sir.

Q. So you are judging from his record now on that proposition?

Mr. MCSHANE: On what proposition?

Mr. EVERETT: That the voucher covers the payment of this bill that you have here.

A. Yes, that is what I go by.

Q. That is what you are going by, by his record on that.

A. Yes, sir.

Q. Don't you know that there are many places on the line of the Alton railroad where the tracks are used by the Burlington cars?

A. The only place that I know of is the Grove street track. We also used another track, going to what we call Bridgeport on the Chicago & Alton, but for that we are not charged, as we are making delivery of cars to the Chicago & Alton there. But in this case, in using the Grove street track, we have no business for the Chicago & Alton, we are going to another road, and they, therefore pay for the use of that track.

Q. How long is the Grove street track?

A. Well, I should think it would be like a block and a half say, a city block.

Q. Have you ever seen it?

A. Yes, I have seen it.

Q. Do you know where it is located?

A. Yes, I was shown the track about two or three years ago.

Q. Who showed it to you?

A. Chicago & Alton employe showed it to me there.

Q. Was that after you were notified you were to be a witness in this case?

A. No sir, I went there to get familiar with the tracks in
74 checking my bills.

Mr. McSHANE:

Q. What is that, when was that?

A. I said I visited the Chicago & Alton yard some years ago, so as to be familiar with the tracks and the way that they are used, and others use them, where bills are rendered.

Mr. EVERETT: Now, I ask that the court exclude this paper which has been marked as plaintiff's exhibit, because it is based upon hearsay evidence, and not the best evidence which might be produced here, of the facts that it purports to establish.

Mr. McSHANE: It is the original, that is the only point of it. Whether it is right, whether correct or not is not important. It is the original bill. The point is that they charged for that; whether they have overcharged or undercharged, or charged too much or too little is not important; the important point is that—nor is it so important whether it is paid or not, so long as the Alton charges for this service, that is the only important feature. This is the original document, and this man said it was kept in the usual course of business, and he identified it as correct.

Let me ask you another question.

Q. These accounts that you have spoken of, these Alton bills were rendered by the Alton to your Company, and then you looked up your record to see whether it was right or wrong, is that it?

Mr. EVERETT: I object to the question, as to its form.

The COURT: Yes, it is leading.

Mr. McSHANE:

Q. Well, when the Alton bills would come to you in the regular course of business, what would you do now Mr. Sweeney?

Mr. EVERETT: He has been over that.

Mr. MCSHANE: Wait a minute. Let him make that a little clearer, if I can.

Q. What did you do?

Mr. EVERETT: I object to it on the ground that he has been over that, and that he has been cross examined on it.

75 The COURT: He may answer if he can.

A. I would.

The COURT: Overruled.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant by its counsel, then and there duly excepted.

A. I would examine the records to ascertain if the bill as rendered was correct.

Mr. MCSHANE:

Q. Examine your own records?

A. Yes, sir.

Mr. EVERETT: I object to that.

Q. You mean by that your own, or do you mean the Burlington records?

A. What?

Q. By that you mean the Burlington Records?

A. Yes.

Q. Or your personal records?

A. Burlington records.

Mr. MCSHANE:

Q. When you were satisfied it was correct, you would certify it?

A. Yes, sir.

Q. You did certify that this C. & A. bill that they rendered to you was correct?

A. Yes, sir.

Mr. EVERETT:

Q. Now this record was made up, as you told us before, and then you compared it with some one's else record?

Mr. MCSHANE: We are going to prove the movement of these cars your Honor.

Mr. EVERETT: Just a minute we have not got this answer.

The COURT: It may stand for the present. I may change my mind afterwards. I will let it go in for the present. If he does not follow it up, it will have to go out.

Mr. EVERETT: Exception to the ruling.

76 To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE: We will follow it up and show the movements of these cars. That is all.

Mr. EVERETT: That is all.
(Witness excused.)
Mr. MCSHANE: Mr. Dorsey.

77 W. W. DORSEY, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. McShane and testified as follows:

Q. What is your name?
A. W. W. Dorsey.
Q. Your age?
A. 27.
Q. And your business?
A. Engineer.
Q. A locomotive engineer?
A. Locomotive engineer.
Q. For what road?
A. Chicago, Burlington & Quincy.
Q. The Chicago, Burlington & Quincy, we speak of it as the Chicago, Burlington and Quincy and the Burlington and the C. B. & Q. all that—that is the same road?
A. Yes sir.
Q. Where does it run?
A. Well from Chicago to Denver, St. Paul, Minnesota, Kansas City.
Q. Kansas City?
A. Yes, sir.
Q. Hauls freight and passengers?
A. Sir?
Q. Hauls freight and passengers?
A. Yes, sir.
Q. By the way, do you know where the Chicago & Alton runs?
A. From Chicago to Kansas City and St. Louis.
Q. And it hauls freight and passengers?
A. Yes sir.
Q. And has for years?
A. Yes sir.
Q. And the same is true of the Burlington?
A. Yes sir.
Q. How long have you been with the Burlington?
A. Little over 9 years.
Q. And these two roads were the same all of the time since you have been railroading, is that right?
A. Yes, sir.

78 Q. Now, coming down to the date of this accident, what engine did you have?
A. Engine 1516.
Q. Switch engine?
A. Yes sir.
Q. Who was your fireman?
A. I believe F. Doyle, Frank Doyle.

Q. Who was the foreman or conductor? Who was the conductor of the crew?
A. J. Wagner.
Q. Who were the two switchmen?
A. John Connell and Frank Coleman.
Q. Where did you start from with these cars that were involved in this accident to Wagner?
A. About Harrison and Canal.
Q. What kind of cars were they—freight or passenger cars or what?
A. Baggage cars.
Q. Baggage cars?
A. Yes sir.
Q. Were they cars with platforms on the end?

Mr. EVERETT: I object to that, the witness ought to be able to describe that.

A. No sir.

The COURT: Objection sustained.

Mr. MCSHANE:

Q. What kind of cars were they, with reference to whether they did or did not have platforms?
A. Well, they were baggage cars, with no steps or platforms at the ends; they were what they call blind baggage cars.
Q. Were they cars of the pattern in general use or not?
A. Well, yes——

Mr. EVERETT: Objected to as immaterial.
Mr. MCSHANE: It is not important, but I think it is proper.
Mr. EVERETT: I withdraw it. He has answered it.

Q. You said "yes," didn't you?
A. Yes.

Mr. MCSHANE: He said yes.
79 Mr. EVERETT: I withdraw the objection.
Mr. MCSHANE: You withdraw the objection?
Mr. EVERETT: Yes.

Mr. MCSHANE: Well, now, when you had started from the place that you have spoken of, which end of the cars was your engine coupled to?
A. Well, at the head end first.
Q. How did you travel from that point?
A. South.
Q. To the place of this accident?
A. Sir?
Q. How did you travel from that place where you started to the point of the accident?
A. South and then north, shoving.
Q. Well, you went south on what road?
A. On the Fort Wayne.

Q. Well, you were on the Burlington when you started, weren't you?
A. Yes sir.
Q. Where did you get off the Burlington?
A. At 12th street.
Q. And then you went on the Fort Wayne?
A. Fort Wayne, yes sir.
Q. That is spoken of generally as the Pennsylvania & Fort Wayne?
A. Same thing.
Q. Pennsylvania?
A. Yes sir.
Q. All right. Then you went on the Fort Wayne where?
A. To, I believe, Archer avenue.
Q. Yes. Then where did you go?
A. Shoved around the track, north, on the Western Indiana tracks.
Q. Well, this track—was that the track that this accident happened on that you are now speaking of?
A. Yes sir.
Q. Look at that photograph—I refer to Plaintiff's Exhibit A and state whether or not you see the track there that you were on at the time of this accident?

80 (Counsel hands photograph to witness.)

A. This is the track here (indicating).

Mr. McSHANE: Well now, he is indicating the one marked with a cross mark.

Mr. EVERETT: Where did you say, what track?
A. This track here (indicating).
Mr. McShane: Well, now, he is indicating the one marked with a cross mark.

Mr. Everett: Where did you say, what track?
A. This track here (indicating).

Mr. McSHANE: That circular track.

Q. You are indicating the track marked with a cross, are you not?
A. Yes sir.
Q. Is this post here the post in question shown on this picture (indicating)?
A. Yes sir.
Q. When you were going around there you were moving in which direction?
A. North.
Q. Well, rather northeast, wasn't it?
A. Yes sir.
Q. Around the curve?
A. Around the curve yes.
Q. And was this post on the inside or outside of the curve?
A. It is on the inside of the curve.

Q. When these cars were going around there, was your engine pulling them or was it pushing?
A. Shoving them, pushing them.
Q. Heading north?
A. Heading north, yes.
Q. You were on the right hand side?
A. I was on the right hand side.
Q. On the inside of the curve?
A. On the inside of the curve.
Q. And the fireman was on the other side?
A. Yes sir.
81 Q. How fast were you going around there?
A. I should judge about eight or ten miles an hour.
Q. Where was Wagner before this accident, just before the accident, what part of the train was he on?
A. Well, he was riding on the car, the first car headed north, that we were shoving.
Q. Which side of the car was he on?
A. On the right hand side.
Q. On this side (indicating)?
A. Yes sir.
Q. Where was he standing, what part of the car?
A. Well, he was standing on a truss rod.
Q. Yes. What did he hang on to?
A. Well, to an iron, to a grab-iron alongside of the car door.
Q. How many doors were there on the car, that side of the car?
A. Two.
Q. Were all three cars just the same?
A. Yes, sir.
Q. What was he doing—how many cars were there altogether?
A. Well, I am pretty sure there was five.
—. They were all of the same kind?
A. Yes, sir.
Q. What was Wagner doing in the general movements there?
A. Well, he was riding on this car, to give signals governing the movements of cars.
Q. Where was the other switchman—who was the head switchman?
A. John Connell.
Q. Where was he riding?
A. Located on the footboard of the engine.
Q. And where was the rear man?
A. Well, he was on the rear end, the north end of the train.
Q. Could you see him?
A. No I could not.
Q. He could not signal?
A. Well, he could, by reaching out part of his arm, but it was not practically a good sight for him.
82 Q. So Wagner was the man who was controlling the movements?
A. I was moving the train under his signal, yes sir.

Q. You were watching for his signals?
A. Yes, sir.
Q. Now, what was it that you saw about this accident, tell these gentlemen?
A. Well, while we were shoving these five cars around this curve at a speed, I presume, of about eight or ten miles an hour. It is down an incline, the train was drifting; just where this post is, where the accident happened, was—I noticed about—well, perhaps the wink of an eye after the man had gone through the post, and I also——
Q. What is that?
A. When we came to this post here, where Wagner was riding, with the five cars——
Q. Yes.
A. And the accident happened just about the same time, when this man, Connell, on the foot-board, gave the signal, and I—between Mr. Connell and I—I presume I saw the accident about the same time that he did.
Q. Now, what did you see happen to Wagner, if anything?
A. Well, I seen him falling.
Q. Whereabouts, in reference to the post?
A. Well, he fell on the north side of the post.
Q. Fell on the north side of the post?
A. Yes, sir.
Q. The post?
A. Or, rather, the semiphore.
Q. So there will be no mistake about it, is this the post (indicating on photograph)?
A. The semiphore?
Q. Is this the post; is this the semiphore, is that the post shown on this picture marked——

Mr. EVERETT: I object, the witness ought to be able to identify it.

83 The COURT: Objection sustained.

Mr. MCSHANE:

Q. What post do you mean?
A. This semiphore here (indicating).
Q. Is that the white or the black one?
A. The white one.
Q. On the inside of the curve?
A. On the inside.

Mr. EVERETT: There is a letter of the alphabet over the post.
Mr. MCSHANE: Well, that is "E", isn't it, that looks like "E".
Mr. EVERETT: Yes, I think so.

Mr. MCSHANE:

Q. The "E" on top, that is the post that you mean, is it?
A. That is supposed to be an "E" yes.
Q. Yes.

A. Well, I presume, yes, that is the one I have reference to.
Q. What did Wagner do, did he give a signal or anything?
A. No, sir.
Q. What did he do?
A. He fell to the ground.
Q. What did you do?
A. Stopped immediately.
Q. Did you go up there where he was?
A. Yes sir.
Q. How had he been standing just before that, and what had he been holding on, with one or both hands, if you know?
A. Well, I believe both hands, I am quite sure.

Mr. EVERETT: I move that be stricken out, unless he is sure.

Mr. MCSHANE:

Q. Well, as you saw it, how did it appear to you, when you——

Mr. EVERETT: Then the other answer goes out?
Mr. MCSHANE: Yes, I don't care for it.

A. Well, sir, there is a truss-rod underneath the door of this car.
Q. Yes.
A. Mr. Wagner was standing on this rod; there was no other where for him to stand.
Q. Yes.

84 Mr. EVERETT: I move to strike it out.

A. (continued). I believe that the car that he was standing on, that there was not room enough there, so he was standing on this rod here, hanging on to the car door.

Mr. EVERETT: I move "that there was no other place for him to stand" be stricken out.
Mr. MCSHANE: I don't care about that.
The COURT: Strike it out. Just tell what was said or done there.
Mr. MCSHANE: The witness has indicated that the man was standing with both arms this way (indicating), apparently holding on with both hands, is that right, for the purpose of the record?
Mr. EVERETT: He said that he believed that——
Mr. MCSHANE: Well, I mean that is the description he has given.

Mr. EVERETT: Did you see him yourself?
A. I did.

Mr. MCSHANE:

Q. In that position?
A. I was personally watching all of the time.
Mr. EVERETT: All right.
A. Well, when we came to this post, I noticed the man getting in towards the car, but I took it for granted that——

Mr. EVERETT: Wait a minute.
The COURT: Yes, objection sustained.

Mr. McSHANE:

Q. How close did he appear to be to the post at the time you say you saw him crowding in?

A. Well, I should say, perhaps five or six feet from the post.

85 Q. Then when they passed the post, you saw him fall?

A. Yes, sir, I did, and we went and picked the man up and carried him over to a shanty.

Q. When you got up there, where were the cars standing, any of them, with reference to the post?

A. Well, I presume about midway of the post.

Q. How close did the side of the car come to the post?

A. Well, I don't think it was more than ten inches, at least between eight and ten inches.

Q. Between eight and ten inches between the side of the car and the post?

A. Yes, sir.

Q. Do you know whether there was a recess at the door, whether the door was in a little, or did you notice?

A. Well, I presume the door was in about four inches.

Q. Well, you presume, is that your recollection?

A. Yes sir, that is about it.

Q. Before we go to Wagner, what was done with the train after that—did you take the cars anywhere?

A. After the accident?

Q. Yes.

A. Yes, sir, the cars were delivered to their destination.

Q. Where were they going?

A. They were to be delivered to 55th street, in the Erie tracks, in the general yards.

Q. That is the Chicago & Erie railroad?

A. Yes, sir.

Q. That Erie railroad runs from Chicago to Norfolk, is that right?

A. I believe it does—it runs to eastern points.

Q. Runs through the eastern states somewhere?

A. Yes, sir.

86 Q. Did you, in coming back, did you come back with a load, or light?

Mr. EVERETT: I object as immaterial.

A. Came back light.

Mr. McSHANE: I think it is competent to show the facts here, as to tending to show the facts here about these bills.

The COURT: Overruled.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant by its counsel, then and there duly excepted.

Mr. McSHANE:

Q. Did you come back the same way that you went?

A. Yes sir.
Q. By "light", you mean without any cars?
A. Without a train, yes sir.
Q. Who went on with the train shortly after the accident, what train men?
A. John Connell and Frank Coleman.
Q. The two switchmen?
A. Yes sir, the other two remaining.
Q. Now, when you got to Wagner, how did you find him, tell us all about it.
A. Well, the man was lying down on his back partly, partly on his side. We made——
Q. Yes.
A. We made inquiry as to whether he was hurt.

Mr. EVERETT: I object to that, I object to his telling anything that was said.

Mr. MCSHANE:

Q. Did he walk, or did you carry him?
A. He was not able to walk.

Mr. EVERETT: Wait, I move to strike it out.
The COURT: Objection sustained. Tell what was said and done there—what was done, rather, not what was said.

Mr. MCSHANE:

Q. What was done with him while you were there, was he taken any place?
87 A. Well, we removed him to a little shanty.
Q. How did you get him into the shanty?
A. Mr. Connell and I and Mr. Coleman carried him.
Q. You left him in the shanty?
A. We left him there, yes sir.
Q. You went on with the cars?
A. Yes.
Q. Was he there when you went on with the cars?
A. Yes sir.
Q. Had any doctor come, or anything of that kind?
A. Well, not while we were there, but the case was left in the hands of somebody there to call some one, I believe the patrol wagon there at Archer avenue.
Q. Ordered you boys to go on, didn't he?
A. Yes, sir.
Q. You obeyed his orders and went on?
A. Yes sir.
Q. Left him there?
A. Yes, sir.
Q. By the way, that job was a hurry-up job, wasn't it?
A. Yes, sir.

Mr. EVERETT: I object to the form of the question. Move the answer be stricken out. Strike out the answer.

The COURT: Objection sustained. Answer stricken out.
Mr. MCSHANE: All right.

Q. By the way, had you been over that way before?
A. That was my first trip.
Q. You were then going to—you were going around this track, you were going to the Western Indiana, is that right?

Mr. EVERETT: I object to the form of the question.

A. Yes, sir, Western Indiana track.

Mr. EVERETT: I move to strike that out until my answer can be ruled on.
The COURT: Just a minute (addressing the jury), Mr. Rogers is wanted at the Phone, some of his folks are taken seriously ill. You have no objection?
88 Mr. EVERETT: No, not a particle.
The COURT: You may go to the phone, Mr. Rogers.
Mr. EVERETT: The Court may rule on that objection while Mr. Rogers is telephoning.
The COURT: What is the question?
(Question and answer read.)
Mr. EVERETT: That is objected to, as suggesting to the witness, and it has been answered on his direct.
The COURT: He answered it before on his direct examination.
Mr. EVERETT: The answer will be stricken out?
The COURT: Yes, strike it out.
Juror ROGERS: May I make a statement to the court?
The COURT: Yes.
Juror ROGERS: I just got notice that I have got a telegram from my mother in Boston that she is dangerously ill. Is there any chance that I could be excused from the jury, in case it should be necessary that I should have to go there. She made that request.
The COURT (addressing counsel): That is up to you, gentlemen.
Mr. MCSHANE: What is that? I did not hear it.
The COURT (addressing Juror Rogers): You may make the statement.
Juror ROGERS: There has been a telegram sent me from Boston, where my mother lives, saying she is dangerously ill. She is 82 years old. She made the request that myself and my sister, who is here in Chicago with me, would hurry on there.
Mr. MCSHANE: I consent that he may be excused, and we go on with eleven jurors.
Mr. EVERETT: I will agree to that. You can catch a train at 5:30 I think on the Michigan Central.
Juror ROGERS: There is a possibility that I may not have to go, but she made that request. The telegram says that she is dangerously ill.
89 Mr. MCSHANE: He will have that on his mind, and I think it is probably better to let him go.
The COURT: The gentlemen have agreed, and you are discharged.

Mr. EVERETT: You may go, and we will proceed with eleven jurors.

Juror ROGERS: Thank you very much.

The COURT: Proceed, gentlemen.

Mr. MCSHANE: That is all.

Cross-examination by Mr. EVERETT:

Q. I show you a document, purporting to be signed, "W. W. Dorsey."

(Counsel hands document to witness.)

A. Yes sir.

Mr. EVERETT: I ask that that be marked for identification "Defendant's Exhibit 1."

(Whereupon said paper was marked by the reporter, "Defendant's Exhibit 1, for iden.")

Mr. EVERETT: That is the statement you made after this accident, isn't it?

A. I don't know, I have not fully examined it, I suppose that is mine.

Q. Well, look it over.

A. Yes, that is the one.

Q. You were in the employ of the Chicago, Burlington & Quincy at the time of this accident?

A. Yes sir.

Q. So was Mr. Wagner?

A. Yes sir.

Q. He was the man in charge of your train?

A. Yes, sir.

Q. You followed his directions?

A. Yes, sir.

Q. He directed you to pass over this track, did he?

A. Yes sir.

90 Q. And directed you in what manner you should proceed from Harrison and Canal to 55th street, Erie yards?

A. Yes sir.

Q. And you followed his directions?

A. Yes, sir.

Q. When did he give you that direction, as to the manner in which you should go there, go to that Erie yard?

A. Just before we started with the train, about fifteen minutes, I presume, or twenty minutes before this accident.

Q. How long, at that time, had you been working for the Burlington?

A. Well, sir, about ten years.

Q. Switching down there in the yard, around those tracks?

A. Yes, sir.

Q. You say you had never passed over this track before?

A. No sir, I had been working for the Burlington. This was a delivery away from the Burlington.

Mr. McSHANE: Read that answer, please.
(Answer read.)
Mr. McSHANE: That is all.

Mr. EVERETT: Now, Mr. Dorsey——
A. Yes.
Q. Then you had been switching in the Burlington yard, had you?
A. Been in the employ of the Burlington, yes sir.
Q. I say, you had been working in their yard?
A. In their yard, Burlington yards?
Q. Yes.
A. Yes, sir.
Q. Didn't you go out of the yard at all?
A. Occasionally, yes.
Q. You don't remember every piece of track you go over, do you, in ten years?
91 A. Pretty nearly, yes sir.
Q. How long had Wagner been your conductor?
A. Well, I presume three or four days previous to this time. We don't get the same man every day.
Q. How long had he been working for the Burlington to your knowledge prior to the accident?
A. About ten years.
Q. Been conductor on a freight train, had he?
A. That I am not aware of. At least four years that I know of.
Q. Had he been working around the yard, Burlington Yard?
A. Burlington, yes sir.
Q. That is the Burlington yard?
A. Yes sir.
Q. Where is the Burlington yard located?
A. Well, the termination of their yard is between 16th and Harrison street.
Q. Over near Canal?
A. Yes sir.
Q. Canal street is the Western boundary of it?
A. The first street from the railroad, yes sir.
Q. Do you know who gave Wagner his orders to take this car and make the delivery?
A. I do not, no sir.
Q. In the usual course of business from whom would he get them?
A. Sir?
Q. In the usual course of business as you transacted it there from whom would he get them, from whom would he get his orders?
A. From the conductor.
Q. From whom would he get his orders, I say, from the yardmaster?
A. I presume he would, yes sir.
Q. Do you know whether the yardmaster directed him on this day?
A. I could not say as to that.

Q. But he was the person who usually directed him where
92 the cars were to be delivered, was he?
A. He directed me, yes sir.
Q. Well, he directed the conductor and the conductor directed you?
A. The yardmaster.
Q. The yardmaster?
A. I believe he does, yes sir.
Q. Well, what is his name?
A. Well, the general yardmaster, they have five or six of them.
Q. Now as you got down to Grove street, did you go over from the Fort Wayne to the Western Indiana—the Western Indiana to the Fort Wayne, that was it, wasn't it?
A. Yes sir.
Q. When you got down there did you stop for a switch?
A. From the Fort Wayne?
Q. Yes.
A. Yes sir.
Q. Who turned the switch?
A. The switch tender.
Q. He was standing there, was he?
A. Yes sir.
Q. Who gave the order to turn that switch so as to let your train in on to this track?
A. Who gave the order to the switch tender?
Q. Yes.
A. Well, I believe he has jurisdiction over it himself.
Q. How would he know your train wanted to go over to make the connection with the Pennsylvania?
A. Not unless Mr. Wagner informed him.
Q. Wagner was on the head car?
A. He could not be on the head car when he started to throw the switch, when we started in to enter upon this track. This was before we commenced to proceed on this track, is that what you meant?
Q. Just before you got up to the switch that was turned to permit you to go on this track?
A. He was standing up there when the switch was thrown.
93 Q. Where was Wagner then?
A. Together with the switch-tender.
Q. Together with the switch tender on the ground?
A. Yes sir.
Q. You saw him talking with him?
A. Sir?
Q. You saw him talking with him?
A. Yes sir.
Q. Did you hear what he said?
A. I did not.
Q. But you saw the switch tender turn the switch?
A. Throw the switch, yes sir.
Q. Then Wagner gave you the signal to come ahead, didn't he?
A. Yes sir.

Q. And your engine was at the rear end of the train?
A. My engine was at the rear end of the train, yes sir.
Q. This baggage car was the first car?
A. Well, there was five baggage cars, they were all baggage cars.
Q. Well, the one he was on was the first car?
A. The one he was on was the first one, yes sir.
Q. He climbed on the head car?
A. Yes, sir.
Q. This is a picture of that car, isn't it, that he was on, or a blue print of it.

(Counsel hands blue print to witness.)

A. I could not swear.
Q. Does it look like it?
A. That appears to be, yes.
Q. Which door did you see him standing at, the forward door or the rear one?
A. I believe it is this one, if I remember right (indicating on blue print).
Q. The forward one?
A. Yes, sir.
Q. His feet were on this rod that is marked here, were they (indicating)?
A. I don't know whether on this rod (indicating) or not.
94 I presume there is another one underneath this door here (indicating).
Q. Up there (indicating)?
A. Another rod (indicating) yes sir.
Q. Well, was there another rod there (indicating) do you know?
A. Well, I am not positive.
Q. If there was not another rod, he was standing on this rod shown in this picture then (indicating)?
A. Yes sir.
Q. Where I put a figure 1, that is correct, is it?
A. Yes sir.
Q. And the door that he was in front of is the one that is under the figure 2?
A. Yes sir.
Q. That door you say, stood in probably four inches or more?
A. I won't say, I suggested—or I should rather think it stood in about the width of this here (indicating railing).

Mr. McSHANE: That is about four inches?
Mr. EVERETT: That is about four inches.

Q. That is about four inches, isn't it?
A. Yes.

Mr. EVERETT (addressing Mr. McShane): Where is your ruler?
Mr. McSHANE: I have not got it, but that is about it.
(One of the jurors produces a ruler.)
Mr. EVERETT: Here we have one.

The JUROR (after measuring the railing indicated by the witness): Four and three-eighths.

Mr. EVERETT: Four and three-eighths inches?

The JUROR: Yes.

95 Mr. EVERETT: Was he standing with his feet on that step up even with the door where this door is set back (indicating)?

A. You mean standing on this (indicating on blue print)?

Q. Yes.

A. No sir.

Q. You saw his feet below there?

A. Yes sir.

Q. Now this car had a grab iron and a strap on the front end, didn't it?

A. Yes sir, I presume it did.

Q. That was put there for the purpose of the brakeman taking hold of, and stepping into that step where they had to follow along with their train, wasn't it, in lieu of a platform and steps?

Mr. MCSHANE: I object to the purpose of it, your Honor.

Mr. EVERETT: Wasn't that what it was commonly used for?

A. Yes, this arm was put there, I suppose for them to reach in to make a coupling, or something of that kind.

Q. Didn't they have grab irons there, too?

A. That I could not say.

Q. An iron strap, arm, strap or step?

A. At the end of the car.

Q. Yes.

A. No sir, I did not——

Q. Do you know whether there was one there?

A. Well, I presume there must have been something there.

Q. What time of day did this accident happen?

A. In the morning at eleven o'clock or about there.

Q. About noon time?

A. Yes sir, about noon time.

Q. Was it a bright day?

A. It was.

Q. There was nothing to *n*obscure his view from the time that he turned in off of the Western Indiana tracks where he left and went over to the Pennsylvania, or was it the other way?

96 A. Yes sir.

Q. There was nothing to obstruct his view from the time he left the Western Indiana tracks until you got up to this semaphore, that would obstruct his view of the semaphore, was there?

A. The Western Indiana track or the Fort Wayne, do you mean?

Q. Was there anything to obstruct his view from the time he left the main track and started in on this curve?

A. Not that I know of, no sir.

Q. If one had looked towards the direction in which you were going, he could have seen the pole, couldn't he?

A. Well, it might possibly appear to a man that he might see it.
Q. Is that a picture of the situation there as it appeared that day as you turned into the tracks?

(Counsel hands photograph to witness.)

A. Yes sir.
Q. Which was is that looking?
A. Well, that is looking northeast.
Q. The elevator is northeast, is it?
A. Well, more straight north.
Q. What?
A. More toward the north.
Q. I mean the elevator building off in the back of the picture?
A. Well north or northeast, yes.
Q. Is this a correct view of the place at the time of this accident? (Hands another photograph to witness.)
A. No, that is not a picture of it at all. This is a picture of the vicinity but not of the track.
Q. Isn't this the semaphore post that you have been talking about?
A. No sir, that semaphore runs over to the north of this here tower (indicating).
97 Q. Isn't this looking in the opposite direction from the other picture, isn't that what is confusing you?
A. No sir.
Q. That one (indicating), you say is a picture of it?
A. Yes sir, here is a picture of it, yes sir.
Q. And where is the tracks that you left, point them out then?
A. Before we got here (indicating)?
Q. Yes.
A. It is not here.
Q. Isn't this the track here (indicating)?
A. No sir.
Q. What?
A. No sir.
Q. Where was the track?
A. The track was running diagonal right at right angles (indicating).
Q. Well, is this the curved track that you went in on that made the connection between the Chicago, Burlington & Quincy track and the Pennsylvania?
A. Yes sir.
Q. Well, didn't you enter the track down here some place (indicating)?
A. Yes sir, at right angles up here, I presume (indicating).
Q. Led up, down here (indicating), going that way to the northeast?
A. Yes sir.
Q. Then you must have been on this track or on one of those tracks over here further (indicating)?
A. Well, we were not on any of those tracks over there then.
Q. This track is the track that you went on, isn't it (indicating)?

A. Yes sir, that is the track.

98 Q. That is the semaphore pole that brushed him off, as you say?

A. Yes sir.

Mr. EVERETT: We will mark that with the letter A. We will mark the picture B, Defendant's Exhibit B for identification.

Q. And the track you were on was this track here (indicating)?

A. Yes sir.

Mr. EVERETT: I will mark that B.

Q. That is the point there, that is where he was brushed off?

Mr. MCSHANE: I object to your using the words "brushed off." He was crushed in there between that car and the post.

Mr. EVERETT: Well you may designate it as you see fit.

Mr. MCSHANE: Yes.

Mr. EVERETT: You may designate that as you see fit when you come to the designation.

Q. Now my point is this, that after you started to get on to this curved track, which is marked B on this Exhibit B, there was nothing from there to obstruct a view of this semaphore, was there.

A. No, there was nothing to prevent his view that I know of.

Q. Anybody that looked at it could have seen it?

A. Yes sir——

Mr. MCSHANE: Wait a minute—go ahead.

Mr. EVERETT: The sun was shining.

A. Well, I do not recollect, I believe it was.

Q. Bright day, wasn't it?

A. Clear, yes, I think so.

Q. You were on the right hand side of your engine?

A. Yes sir.

Q. That put you to the west?

A. No, on the east side.

Mr. MCSHANE: You say these are cuts of those cars (referring to blue print)?

99 Mr. EVERETT: He said it was, I did not say so.

Mr. MCSHANE: He said he supposed that they were.

Mr. EVERETT: Yes.

Mr. MCSHANE: Do you say that they are?

Mr. EVERETT: I don't know. You say it is not?

Mr. MCSHANE: I don't know a thing about them, I am just asking.

Mr. EVERETT: Yes, I say that it is, that is I was told that it was.

Q. That put you to the west side of the engine, didn't it?

A. No sir.

Q. Which side?

A. East side.

Q. Was your engine going tender first or head first?

A. Head first.

Q. How far was Wagner, when he was hanging on the car, from the front end of the car?

A. He was on the car.

Q. How far from the front end of the car was he just before he was brushed off?

A. Well, I presume about 20 feet.

Q. How long was that car altogether?

A. Well, I don't know the exact dimensions, I presume about 60 feet.

Q. Was he on the inside of the curve?

A. Yes sir.

Q. So that he was in your view all the time?

A. Yes sir.

Q. Which way was he looking, ahead or not?

A. Well, I presume that the man was, yes sir.

Q. Did you see?

A. Sir?

Q. Did you look to see?

A. I was watching him, yes.

Q. Did you see him make an effort to get in as he went by that post?

100 A. Just before he came to the post, yes sir.

Q. What did he do?

A. Well, he crouched in this doorway.

Q. Were his feet on the floor level of the car?

A. On the stirrup, or on that rod. He was about three quarters of the door——

Q. What is that?

A. He was about three-quarters of the door standing up.

Q. Well, that rod was about a foot and a half under the car floor, wasn't it?

A. I presume it was, his knees came about I should judge about where the sill of this door came.

Q. Did he have both hands on the hand*le* holds there?

A. Well, I was not taking notice of that, but I believe he was.

Q. Was he giving you a signal?

A. No sir, not at that time.

Q. Had he given you any after your car had started in on this curve?

A. No sir, there was not any to be given that I know of.

Q. How long was that piece of curved track?

A. Sir?

Q. How long was this piece of curved track?

A. Well, perhaps 200 feet, in the neighborhood of that.

Q. All he had to do was to stand on there and look ahead, wasn't it?

A. Yes sir.

Q. Now, you were not going eight miles an hour when you left that track, leaving that curve, were you?

A. Were not going eight miles an hour?
Q. Yes.
A. Well, we had to start at a point.
Q. You came to a dead standstill before you got to the switch, hadn't you?
A. Yes sir.
Q. And that was only a few feet from this curved track wasn't it, from this semiphore?
A. No sir, that was perhaps the length of the train.
101 Q. The switch was?
A. The semiphore—is that what you said?
Q. Yes, when you stopped, how far was the semiphore pole from your head end of your train?
A. About two car lengths, I should judge, about two car lengths and a half.
Q. How many feet?
A. Perhaps 100, 115 or 120 feet.
Q. Did you get up a speed of eight or ten miles an hour in going those hundred feet.
A. Well, the semiphore is about five car lengths from the switches, and it is on an incline down.
Q. Isn't it a fact that you were not going over four miles an hour at that time?
A. Well, it might be that we were going four, but I should judge as I said, about six or eight miles an hour, in that neighborhood.
Q. About six?
A. Yes sir, six to eight in that neighborhood.
Q. Wagner had been used to getting off the cars while they were in motion, had he not, during the time that he had been switching with you?
A. Yes sir.
Q. Didn't you state in the statement that you made to the Burlington railroad shortly after the accident on December 15th, 1908, that your train was going six miles an hour.
A. Well I should say between six and eight miles an hour.
Q. Didn't you say six?
A. Well, it is pretty hard for a man to judge a distance of a mile or two miles an hour.
Q. But your recollection was better three years ago than it is now, isn't it, on that point.
A. Well, I should judge that it would be, if I remember rightly.
Q. If you stated the day of the accident or the day after the accident, that you were going six miles an hour, you knew more about it then than you do now.
A. Not a bit more.
102 Q. You have been thinking about that speed that you were going ever since the 13th day of December?
A. Well, no, I have not. It is pretty hard for a man to judge two miles an hour speed difference.
Q. How far did your engine run after the accident?
A. How far?
Q. Yes.

A. Perhaps two car lengths.
Q. As you approached where was John Connell?
A. On the footboard of the engine, on the front end.
Q. The front end of the engine?
A. Yes sir.
Q. That was between you and the first car, wasn't it?
A. Yes sir.
Q. Did he give any signals?
A. Yes sir.
Q. He got a signal from Wagner and passed it on to you, did he?
A. No sir, he gave a signal to stop about the minute that I seen the man fall myself.
Q. Connell was watching himself, was he?
A. I believe he was, yes sir.
Q. Now was he standing—was Wagner standing with his face towards the car or looking away from the car?
A. Well, he was standing with his face in towards the car, and looking ahead.
Q. He had been in that position how long?
A. From the time we commenced or started on this curve, at the entrance of the curve.
Q. He got on the car immediately after the switchman turned the switch, did he?
A. I believe he did, yes sir.
Q. Did he get on before *he* started up or after you had started?
A. Oh, just about the time that the car started to move, if I remember rightly.
Q. Now, don't you know that that car had a step on the front?
103 A. No sir, I do not, no sir.
Q. You don't know whether it did or not, do you?
A. No sir.
Q. It may have had?
A. It might have had, yes sir. What sort of a step, may I ask you?
Q. What?
A. What sort of a step may I ask you, may I have that again so that I can get the question more definitely.
Q. A step for a man to stand on, not a car step?

Mr. McSHANE: On the end?
Mr. EVERETT: On the end.

A. There was no stand, no steps there.

Mr. EVERETT:

Q. I don't mean steps, I mean an iron strap they call it, don't they, or stirrup?
A. There possibly might have been, I don't know.
Q. That stirrup is for the purpose of a switchman standing on the stirrup, isn't it?

A. No sir.
Q. That is what they use them for?
A. No sir.
Q. What do they use them for?
A. Well, stirrup, do you mean a grab iron, is that what you have reference to?
A. The grab iron, that is over the stirrup, isn't it?
A. Well, I don't know whether there was a stirrup on this car or not.
Q. What?
A. I do not know.
Q. If there was one, that is what it was for, isn't it?
A. Yes sir.
Q. As he approached the semiphore you saw it, didn't you?
A. Well, I can't say that I did because I had not any use for that myself.
Q. Weren't there signals on it that you had to observe?
A. No sir, there was no signal for me in connection with it then.
Q. That was in connection with the main line, was it?
104 A. I could not swear to it.
Q. Didn't you understand the use of that semiphore?
A. Well sir, this track that we were on was a cross line.
Q. You had been on the main line, hadn't you?
A. Well, that semiphore didn't have anything to do with the track that we were on at all.
Q. What does the semiphore operate, do you know?
A. Probably the semiphore is operated for the track that runs diagonally over the Fort Wayne tracks.
Q. Do you know that to be a fact?
A. No sir, I do not know it to be a fact, but I can see by the picture here——
Q. Don't you know that semiphore is operated by the Chicago & Western Indiana?
A. Sir?
Q. That semiphore is operated by the Chicago & Western Indiana, isn't it?
A. I don't know sir.
Q. How far was this semiphore pole from the nearest rail of the track that you were on?
A. How far?
Q. Yes.
A. Well, I do not know the exact measurements.
Q. What is your best judgment of it?
A. Perhaps between three and a half feet, three and a half and four feet.
Q. When the car went by what distance was there between the outer edge of the car, and the nearest part of the semiphore?
A. Well, I should judge between eight and ten inches from my point of view.
Q. You saw that, did you?

A. Yes sir, I did.
Q. Before you got up to the semiphore?
A. No sir.
Q. When did you make that estimate?
A. After we had stopped after the accident.
105 Q. Which side of the semiphore did Wagner land on?
A. On the north.
Q. Nearest to you or the other side?
A. On the opposite side.
Q. Then he went by the semiphore?
A. Well, he went between the semiphore and the car.
Q. Well, he fell down on the far side of the semiphore pole?
A. Yes sir.
Q. He fell from the cars, did he, away from the cars, he fell away from the cars, did he?
A. Yes sir.
Q. No cars—no wheels ran over him?
A. No sir.
Q. As he went by the semiphore you saw him straighten in and get in towards the car as far as possible, did you?
A. No sir, he did not move.
Q. He did not move?
A. No sir, he did not move. He did not move from the position after he fell on the ground.
Q. No, I mean before, just immediately before you got up to the semiphore?
A. Yes, about three or four feet, I seen him taking and pulling himself in, that was the appearance; I did not think that he was straightening up for the semiphore, I thought he was just freshening his hold.
Q. Why did it appear to you as if he had room enough to *to* in between the semiphore and the car?
A. Well, yes it did, it did have that appearance, yes.
Q. You were looking right along the line, along the line taking observations, watching the men and the movements of the train?
A. Yes.
Q. And his head was watching towards the semiphore as you came up towards it, his face was turned towards it?
106 A. I don't know whether he was looking exactly at the semiphore or not, but he was watching the movement of the trains.
Q. The semiphore was before you so that you could have seen it as you went along, isn't that so.
A. Well, the semiphore was set on a curve. I did not pay any attention to the semiphore until I seen him straighten up.
Q. What part of his body did the semiphore strike?
A. Well, it catched the man in through here (indicating) his abdomen.

Mr. McSHANE: Indicating the abdomen now.
Mr. EVERETT: He indicates his hip.
Mr. McSHANE: He indicates his hips, the lower part of his body.

Mr. EVERETT:

Q. Was he conscious when you picked him up?
A. Yes sir.
Q. Did he say anything about it?
A. He said that he was hurt.
Q. Did he walk on his own feet?
A. No sir.
Q. You had to carry him bodily, did you?
A. Yes sir.
Q. How many men carried him?
A. Well, there was three of us I am sure, I think the fourth man was there somewhere.
Q. Did he stand up at all?
A. No sir, he did not.
Q. Did he sit down?
A. No sir, we laid him down.
Q. He did not sit up in a sitting position?
A. No sir.
Q. Did he remain conscious all the time, did he?
A. Yes sir.
Q. He told you to go ahead and take your train to the Erie yard?
A. Yes sir.
107 Q. Was his clothing torn?
A. Well, I do not believe they were, nothing any more than his clothing being open.
Q. No rips or tears in the trousers or——
A. I don't recollect.
Q. Was he bundled up pretty well?
A. Yes sir.
Q. December wasn't it?
A. Sir?
Q. When was this accident?
A. In the month of December.
Q. Cold?
A. No sir.
Q. Did he have on an overcoat?
A. If I recollect, I believe he did.
Q. Was that torn?
A. Not that I remember.
Q. Did you see any blood?
A. No sir, I did not.
Q. Bleeding about the face, or anything of that sort?
A. No sir.
Q. No mark on the face or head?
A. No sir.
Q. You didn't see any mark any place, did you?
A. Nothing more than he complained of his back.
Q. I am not talking about complain-s. I move to strike that out.
The COURT: That may be stricken out.

Mr. EVERETT:

Q. I asked you if you saw any marks on him any place?
A. No sir.
Q. Did he have use of his arms, could he move his hands?
A. Yes sir.
Q. Could he move his legs?
A. No, I don't believe that he could.
Q. Well, did he move them?
A. Not that I remember of no sir.
Q. Where did you see him next?
A. At the hospital.
Q. How many days after that?
A. About three days.
Q. He was employed by the same company you were, the Burlington, was he not?
A. Yes sir.

108 Mr. EVERETT: That is all.

Redirect examination.

By Mr. MCSHANE:

Q. Mr. Dorsey, in switching cars, is there—do the switchman have any particular place on the cars to stand, or any place that is convenient?

Mr. EVERETT: I object to that as calling for a conclusion of the witness.
The COURT: Objection sustained.

A. Why any place——

Mr. MCSHANE: Just a minute, just a minute. Your Honor, it is not probably just exactly redirect, but I will ask the court's indulgence to put this question, as I forgot it.
The COURT: The form of the question is bad.
Mr. MCSHANE: Yes.

Q. From your experience as a switchman in Chicago, have you been in the yards of various roads?
A. Yes sir.
Q. Practically all the roads in Chicago?
A. Nearly all of them yes sir.
Q. Have you during those years observed how the switchmen do their work?
A. I have, yes.
Q. What is the fact as to whether there was any regular place, or was during all these years for a switchman to stand or ride when riding upon or switching cars.

Mr. EVERETT: I object to the question.
Mr. MCSHANE: I think that is competent, your Honor.
109 Mr. EVERETT: I do not see how it is competent at all, calling for a custom, we are not charged with violating any rules

or customs, or is it an excuse for this switchman, if he placed himself in a dangerous position. That is a question for the jury to determine, not aided by the fact that some other switchmen ride in a certain way I do not see how it has any bearing here at all.

Mr. McSHANE: I think that is competent, your Honor.

The COURT: Objection sustained.

Mr. McSHANE: Exception.

To which ruling of the court the plaintiff by his counsel, then and there duly excepted.

Mr. McSHANE:

Q. Now, Mr. Dorsey, you said that Wagner had nothing to do but look ahead. What did he have to look out for, ahead, what?

A. Well, he had——

Mr. EVERETT: Wait a minute, I object to that.

Mr. McSHANE: He asked what he had to look for.

Mr. EVERETT: I asked him what he could see if he looked that way.

Mr. McSHANE: You asked more, you said he had nothing to do but look ahead, I want to know what he had to look ahead for.

Mr. EVERETT: I object to it. This witness does not know what he had to look ahead for. He can say what he was doing there, and he has done that.

The COURT: He may answer that.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

110 A. He was riding there for the movement of the cars, to get the signal from the man on the first car, riding on the first car that we were shoving.

Q. Was the air connected up on your train?

A. Yes sir.

Q. During that time the Burlington had switch engines, and then they had transfer engines, that is, they had engines engaged in switching, and then they had other engines engaged in transfer work?

A. Yes sir.

Q. The switching is in the yard, whereas——

Mr. EVERETT: I object to that as leading in form.

Mr. McSHANE:

Q. What was the work of the switching crew, and what was the work of the transfer crew?

A. Well, the transfer crews is a crew, that transfers from one yard to another.

Q. Yes, and the switching crew, what do they do?

A. Well, they switch cars in short work.

Q. How many switch engines does the Burlington run into Chicago, or about that time how many?

Mr. EVERETT: I object to that as immaterial.
The COURT: Sustained.
Mr. MCSHANE: Just on the question of the likelihood of his not being on this track, to show how much the Burlington did use this track. This gentleman said he had never been there himself, I want to show——
Mr. EVERETT: That has been gone over.
Mr. MCSHANE: I want to show there is a great many Burlington switch engines, some transfers and some others, so that if there is only one switch engine you can readily see it would be improbable that this man had never been on that track, but if there were a great many engaged in different things, it is easy to understand that is the only purpose.

111 Mr. EVERETT: The witness has already said that he was not there.

The COURT: I thought the form of the question was bad that is the reason I sustained the objection.

Mr. MCSHANE:

Q. Did the Burlington use more than one switch engine and crew at that time, if so, about how many?

Mr. EVERETT: I object to that as immaterial in this case.
The COURT: He may answer.
Mr. EVERETT: Exception.
To which ruling of the court the defendant by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. Go ahead.
A. Perhaps 35.
Q. All the signals in your work down there were given on your side, is that right?
A. Yes sir.

Mr. EVERETT: I object to that as leading—I withdraw it.
The COURT: Objection overruled.

Mr. MCSHANE:

Q. Did you pass more than one pole, or was this the only semiphore pole so far as you know?

Mr. EVERETT: I object, the witness does not——

A. That is the only one so far as I know——

The COURT: Objection sustained. Strike it out.

Recross-examination.

By Mr. EVERETT:

Q. Those yards are in the State of Illinois, aren't they, those Erie yards?
A. Yes sir.

Q. And your train was a switching train which is operated inside of the State of Illinois, isn't it?
A. Yes sir.
Q. That is all you had been doing for years?
A. Yes sir.
112 Q. Was this a switch engine or transfer engine?
A. Well, we were using it as a transfer engine.
Q. Transferring took you out of your yard, didn't it?
A. Yes sir.
Q. To other yards?
A. Yes sir.
—. Switch engines remain in the yards and do switching?
A. Well, they are practically, you might say that they are both the same thing, they are more or less. If a man is sent out to make a transfer, that is called a transfer job.
Q. That is, they did not have certain engines set aside as transfer engines, and another set of engines as switch engines?
A. They have——
Q. They use them interchangeably?
A. They have—when they use the engines, or the engines are so appointed for certain work—that is, they send them wherever they feel justified in so doing.
Q. Your engine was both a transfer engine and a switch engine?
A. Yes sir.
Q. Some times you did switching?
A. Yard engine.
Q. Some times you did transferring?
A. Yes sir.
Q. You did both in one day?
A. Yes sir.
Q. And both in one hour sometimes?
A. Perhaps, yes.
Q. Just keep agoing, that is all?
A. Yes sir.
Q. Go any place you were sent to make deliveries?
A. Yes sir.
Q. Then you would call that a transfer?
A. Yes sir.
113 Q. Was this movement you were making, an interchange or a detour movement?
A. How do you infer the meaning of that, make it clearer to me?

The COURT: Read the question and answer?
(Question and answer read.)

Mr. EVERETT:

Q. Do you know the difference between——

Mr. MCSHANE: I don't know the difference between "interchange" or "detour"; you can make an interchange by making a detour; I don't think it is intelligible. He don't understand it; he says so, anyhow.
Mr. EVERETT: All right, I don't insist on an answer.

Mr. McSHANE: That is all.
Mr. EVERETT: That is all.

(Witness excused.)

The COURT: Is this quitting time?
Mr. EVERETT: 4.30 is quitting time.
The COURT (Adressing the jury): Gentlemen, you will be in your places tomorrow morning at ten o'clock, sharp.
Do not permit anybody to talk to you about this case, and do not talk about it among yourselves. Don't make up your minds about the merits of this case until you have heard the arguments of counsel and heard the instructions of the court and got into your jury room, and then begin to ascertain *where* your verdict should be. Be in your places promptly at ten o'clock. Take a recess until ten o'clock tomorrow morning.
Whereupon court adjourned until ten o'clock A. M. Tuesday, May 16th, 1911.

114 TUESDAY, May 16th, 1911—10.00 o'clock a. m.

Court met pursuant to adjournment.
Present same as before.

JULIUS SZERLINSKY, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. McShane, and testified as follows:

Q. What is your name?
A. Julius Szerlinsky.
Q. And your business?
A. Cashier.
Mr. EVERETT: Will you spell your last name?
A. S z e r l i n s k y.
Mr. McSHANE: Your business?
A. Cashier.
Q. For what road?
A. Chicago & Alton Railroad.
Q. You were subpœnaed from your office this morning were you?
A. Yes sir.
Q. You do not know what this case is about, do you?
A. No sir.
Q. Never met any of us?
A. No sir.
Q. Who is Mr. Wood, Mr. Szerlinsky?
A. Assistant treasurer.
Q. What are his initials?
A. H. E. R.
Q. I will ask you to look at these documents that I hand you, look at all of them for a moment, and then I want to question you about them. Look at them carefully (counsel hands witness documents). You have examined them have you?
A. Yes, sir.

Q. That is a statement bill and voucher?
A. Yes sir.
Q. Did they pass through your hands?
A. The voucher passed through my hands.
115 Q. Was the bill and statement attached?
A. No sir.
Q. In the regular course, this bill and statement is not attached, in the regular course of business this bill and statement are not attached when the voucher comes to you?
A. No sir.
Q. On that voucher, that being the voucher referred to by the witness Sweeney, and which I will mark Plaintiff's Exhibit D for identification, you find on this voucher, do you not, a receipt stamp, with a Chicago & Alton stamp, and signed by you as assistant?

Mr. EVERETT: I object to that question.
The COURT: Objection sustained.

Mr. MCSHANE:

Q. Is this your signature, Mr. Szerlinsky (indicating)?
A. Yes sir.
A. Is that?
A. Yes.
Q. I am calling your attention to the signature at the bottom of this C. B. & Q. voucher, am I not?
A. Yes sir.
Q. And this Mr. H. E. R. Wood, assistant treasurer, was he your superior?
A. Yes sir.
Q. The signature is by J. Szerlinsky, cashier, is that right?
A. Yes sir.
Q. Over, and immediately abouve it is "Chicago & Alton,"——

Mr. EVERETT: I object to reading that document, when he has not put it in evidence, nor he has not offered the document, or properly identified it.
Mr. MCSHANE: I will offer it, and then I would like to have the Court see it. Here is a receipt in full by the Chicago & Alton Railroad for this voucher, for this bill.
116 Mr. EVERETT: I object to statement of counsel, it is improper to make that remark before it is admitted in evidence.
Mr. MCSHANE: I offered the bill in evidence yesterday; this is a receipt in full, referring to the bill.
The COURT: This gentleman identifies it, does he? This is the instrument, is it?

Mr. MCSHANE:

Q. That is the instrument, is it?
A. That is the one that has my name on it.
Q. It came to you in the due course of business?
A. Yes sir.
Q. You were authorized to sign it, were you?

A. Yes, sir.
Q. As a receipt?
A. Yes, sir.
Q. As a receipt?
A. Yes.

Mr. McSHANE: I offer that in evidence.
Mr. EVERETT: I object, on the ground it is incompetent, and it does not tend to establish any of the issues in this case.
Mr. McSHANE: It is a receipt for the bill.
The COURT: It may go in.
Mr. EVERETT: Exception.

To which ruling of the court, the defendant by its counsel, then and there duly excepted.

Mr. McSHANE: Now, these two, I want to read them at this time, as explanatory of each other, the bill and the voucher. I promise to prove that these cars went over the track, in fact, I have already proven that.
The COURT: Well, he may cross examine on that, I think.
Mr. McSHANE: Well, I want to go a little bit further.
Mr. EVERETT: The court reserved the ruling on the other document until they made further proof.
Mr. McSHANE: I have since proven that these cars did go over that track.
117 Mr. EVERETT: You have not shown that. You have shown that five cars went over, you have not shown the numbers.
Mr. McSHANE: The numbers are not important; I have shown five cars and one engine, the engine going heavy and coming back light. I want to show more fully——
Mr. EVERETT: There is no identification of the cars.
Mr. McSHANE: Well, you can go ahead and cross examine before I introduce them or before I read this document.

Cross-examination.

By Mr. EVERETT:

Q. You know nothing about the correctness of this bill in any way whatever?
A. No, not personally.
Q. Referring to Plaintiff's Exhibit D, do you?
A. No sir.
Q. You merely, as a matter of form, signed your name?

Mr. McSHANE: I object to "merely as a matter of form," I object to the leading question.
Mr. EVERETT: Well, I have a right to lead on cross examination.
Mr. McSHANE: No, you have not a right to say "as a matter of form." If a man signs a receipt, he is supposed to know what he is doing.

Mr. EVERETT:

Q. In the usual course of business, this voucher, or vouchers similar to this are merely set in front of you in a bunch, aren't they?
A. Yes.
Q. You sign your name to them?
A. I sign my name to them.
Q. You do not know anything about what they are for?
A. No, sir.
Q. Or the correctness of them?
A. No, sir.
Q. You have no knowledge whether or not two engines and five cars passed over a track in the month of December, 1908, as
118 stated in this bill, do you?
A. No, sir.
Q. All you have stated to me is all that you know about this bill?
A. Yes, sir.

Mr. EVERETT: That is all. I object to its introduction.
Mr. MCSHANE: Just a question further.

Redirect examination.

By Mr. MCSHANE:

Q. After receipting that, you deposited that, didn't you, for the Alton?
A. Yes, sir.
Q. And the Alton got the money?
A. Yes, sir.

Mr. MCSHANE: Now, I ask, inasmuch, as they are both in evidence, your Honor, I ask to read them. I want to question him a little further about the detail, which will appear as I am reading them. I would like to read them.
Mr. EVERETT: I would like to cross examine on that, on the last two questions.
Mr. MCSHANE: Very well.

Recross-examination.

By Mr. EVERETT:

Q. Do you have any personal knowledge that the Alton got the money on that voucher?
A. Well, the endorsing stamp on the back shows it.
Q. That is the only way in which you know that?
A. Yes, sir.
Q. After you signed your name to this voucher, what did you do there with it?
119 A. I deposited it.
Q. In the bank?
A. Yes, sir.
Q. Yourself?
A. No, my assistant.

Q. Then you don't know that it was deposited of your own knowledge?
A. Not of my own knowledge, no, sir.
Q. The only thing that you did was to sign your name on it, wasn't it, and pass it along to some one else?
A. Yes, sir.
Q. That is the last you saw of the voucher?
A. That is the last I saw of the voucher, yes.
Q. That is all you know about it?
A. Yes, sir.

Mr. EVERETT: That is all.

Redirect examination.

By Mr. McSHANE:

Q. But like all other moneys coming to the Alton in the form of vouchers, you receipted for it, and gave it, in the due course, to go to the bank?

Mr. EVERETT: I object to that question.
The COURT: He may answer.
Mr. EVERETT: It is leading and suggestive. It is his witness. Exception to the ruling.
To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. McSHANE:

Q. You passed that on in the regular course of events, and deposited it to the credit of the Alton?
A. Well, I passed it over to my assistant to do it.
Q. Doesn't it show on the back that it was deposited?

Mr. EVERETT: I object; the back will speak for itself.
120 The COURT: Objection sustained.

Mr. McSHANE:

Q. On the back of this voucher is——

Mr. EVERETT: I object; the back will speak for itself.
The COURT: Objection sustained.

Mr. McSHANE:

Q. On the back of this voucher is——

Mr. EVERETT: I object to counsel reading from the back of the voucher.
The COURT: The objection will be sustained.
Mr. McSHANE: You will notice here——
Mr. EVERETT: The court sustains the objection.
Mr. McSHANE: Yes, I have withdrawn it.
Mr. EVERETT: You are asking the same kind of question again.
Mr. McSHANE: No. I am asking him if he does not identify this stamp, signed "H. E. R. Wood."

Q. You identify that, don't you?
A. Well, there might be a duplicate of that.
Q. Well, you know that is yours, don't you?

Mr. EVERETT: I object, the witness has answered.
The COURT: He may answer the question.

Mr. MCSHANE:

Q. Don't you know that that is the stamp that is used when your company deposit these things, don't you?
A. We have a stamp like that.
Q. Is there any doubt in your mind that that is the stamp?

Mr. EVERETT: I object to the question.
The COURT: Yes, the objection will be overruled.
Mr. EVERETT: Exception to the ruling.
To which ruling of the court, the defendant, by its counsel then and there duly excepted.

121 Mr. MCSHANE:

Q. Did you see anything about that to indicate to your mind that is is not the same thing that it purports to be?
A. No, there is nothing there that I can see.
Q. No. In other words, the vouchers that have been there deposited in the bank to the credit of the Alton Railroad are stamped as that one is, aren't they?
A. Yes, sir.
Q. Do you stamp them, too?
A. I do not stamp those, no, sir.
Q. After you receive them, then who stamps them?
A. I turn them over to my assistant.
Q. He stamps them?
A. And he stamps them, yes.
Q. Under your directions?
A. Yes, sir.
Q. Then they go to the bank?
A. Yes, sir.

Mr. MCSHANE: Now, I ask to read them, your Honor.
Mr. EVERETT: I object to the introduction of the two documents he has offered, particularly, because it is without identification that the vouchers are for cars that went over the track.
Mr. MCSHANE: I want to read them, and then examine him about them, I want to examine him about them.
The COURT: The first one is the voucher, and what is the next?
Mr. MCSHANE: The first is the bill. The voucher runs to the bill, by number and all.
Mr. EVERETT: The court will recall the evidence he offered yesterday on the bill.
The COURT: Yes, I recall that. I will let it go in for the time.
Mr. EVERETT: Then I ask that he be not permitted to read them at this time.

122 Mr. McSHANE: I have a right, because I want to question him about these references to each other.

The COURT: They may go in.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted. Said documents so offered and received in evidence are in the words and figures following, to-wit:

123

EXHIB. F.

PL'F EX. "F."

Bill.

Form 133. 10M. 1-'09.

Chicago, Burlington and Quincy Ry.

CHICAGO, ILL., 5/15/11.

Remit to H. E. R. Wood, Assistant Treasurer.
Please quote audit number when remitting.
Address, Chicago, Ills.
Credit, —— ——.

Audit No. 104,359.
Original Dept. No. ——.
Month, Mar. 1909.

F. L. J. 56.

To the Chicago & Alton Railroad Company, Dr.

Mar. 27, 1909. For Trackage on engines and cars passing over Grove St. Chicago, Ill. during the month of December, 1908:

2 engines @ .40¢ per engine	.80	
5 cars @ .20¢ per car	1.00	
	——	1.80

Distribution:

Maintaining joint tracks, yard and other facilities	$.45
Maintaining joint equipment at Terminals	...
Operating joint Yards and Terminals	$.18
Operating joint tracks and facilities	...

Checked by J. J. S. for C., B. & Q. R. R. Co.

General administration Joint tracks, Yard & Terminals ... ...

1.17 1 p.

Date, 4-7-'09.

Rental, Including Taxes, Joint facilities Revenue, Credit. ...
Noted April 4/5/09.

Correct.

J. N. MEUEHEM,
Superintendent.

In an error be found in this bill return with all papers to General Auditor, Chicago, Ill.

124 Ex. D.

Form 2610.

April, 1909.
May 1st, 1909.

F-3-'08. 25M.

Chicago, Burlington & Quincy Railroad Company.

Lines East of the Missouri River.

Burlington Route.

Audit Number, 336.

To the Chicago & Alton Railroad Company, Dr. 132.

CHICAGO, ILL., —— —, ——.

Department Number, D.

1909.
(Year.)
Apr. 13. For trackage on engines and cars passing over Grove Street, Chicago, Ill., during the month of December, 1908, as per statement and bill No. 104,359 attached:

2 engines @ 40¢ per engine	.80
5 cars @ 20¢ per car	$1.00
	$1.80

Correct:
F. L. JOHNSON.

#25, Div. 1, Frt	.45
69, " " "	.18
304, " " "	1.17

Receipt and deposit in bank for collection through Commercial National Bank, Chicago. W. I. Fabian, Cashier. C., B. & Q. R. R. Co. J. P. C.

H. J. JADO.

Approved: —— ——.

Approved: —— ——.

Approved:
I. F. EVANS,
Auditor of Expenditures,
By SMITH,
Auditor of Expenditures.

Approved:
WELDNEANY,
Ass't Gen'l Auditor.

Received May 1, 1909, *190–*, One and 80/100 Dollars, in full of the above account.

THE CHICAGO & ALTON R. R. CO.,
H. E. R. WOOD, *Ass't Treas.*
Per J. P. ZLRBINSKY, *Cashier.*

Witness:

—— ——.

125 & 126 Mr. McSHANE: I want you to listen to this please, while I am reading this, to save trouble. I now read in evidence document marked "Plaintiff's Exhibit F," and it reads "Form 13-310-N 1-9. Remit to H. E. R. Wood, assistant Treasurer, Chicago, Ill., Chicago, Burlington & Quincy Railroad Company. Address, Chicago, Ill. Credit to the Chicago & Alton Railroad Company, Dr., March 27, 1909, for"—written in in typewriting in the body —"for trackage on engines and cars passing over Grove St., Chicago, Ill., during the month of December, 1908. 2 engines at 40 cents per engine, and 5 cars at 20 cents per car." Well, opposite "2 engines at 40 cents per engine is 80 cents, and 5 cars, 20 cents per car is $1.00, making a total of $1.80. Now, right below that is "distribution."

Q. That is in accordance with the Interstate Commerce, isn't it, you distribute the charge?

A. I do not know, I do not have anything to do with that.

Mr. EVERETT: What is the answer?

(Answer read.)

Mr. McSHANE: Well, the stamp on there—I will not read that—that will appear later on. It is checked by "J. J. S." for "C. B. & Q. R. R. Co.," date "4/7/09," marked "correct."

Q. What is the name of the superintendent there please?
A. Mulhern.
Q. Mulhern?
A. Yes.
Q. You know his signature, don't you?
A. No, sir.
Q. But you read this as Mulhern?
A. Yes, sir.
Q. He was superintendent at that time?
A. Yes, sir.

127 Mr. McSHANE (continuing reading):

"If error is not found in this bill, return with all papers to the general office, Chicago, Ill." In the right hand corner, "Please put audit number when remitting:" audit number "104,359." "Department No. — Month, March, 1909." On the back of this are two stamps, which are C. B. — Q. R. R. stamps, which will appear later, I will not read them now.

Now, the voucher which this gentleman has identified, reads as follows:

"Burlington route. Chicago, Burlington & Quincy Railroad Com-

pany. Lines east of the Missouri River. Form 2610. To Chicago & Alton Railroad Company, Dr. Chicago, Ill., 1909, April 13, for trackage on engines and cars passing over Grove St., Chicago, Ill., Chicago, Burlington & Quincy R. R. Co., during the month of December 1908, as per statement and bill No. 104359."

Q. That is the same number as on the bill, isn't it?
A. I didn't see the bill.

Mr. EVERETT: I object to asking that
Mr. MCSHANE: Well, that shows for itself.
The COURT: Objection sustained.
Mr. MCSHANE (reading):
"As bill No. 4359, attached. 2 engines at 40 cents per engine, 80 cents; 5 cars at 20 cents per car, $1.00, making a total of $1.80. Correct, T. L. Johnson." Then there is some other figures here, that you can see that I will not read. Then "Received and deposited in bank for collection, through Commercial National Bank of Chicago, W. G. Fabian, Cashier, C. B. & Q. R. R. Co." Then "J. P. S." I think it is, that is the stamp, and then another—that is below, "approved," and the signature, "Judge," I think it is, and then here again "Approved H. T. Evans, Auditor of Expenditures, per Smith," and again "approved" by some other man named "Johnson, general auditor."

128 Now, below this is this receipt which this gentleman signed: "Received May 1st, 1909, $1.80 in full of the above account," the Chicago & Alton R. R. Co., H. E. R. Wood, Assistant Treasurer, per J. Szerlinsky, Cashier." Over that is also "superintendent"—what is that,—"assistant audit for Treasury Department"—what is that please?

A. Well——
Q. Assistant, is that it, "ass't"?
A. That is Burlington stamp.

Mr. MCSHANE: That is a Burlington stamp, "Assistant Audit for Treasury Department, May 1st, 1909, C. B. & Q. R. R. Co." Now, on the back of this voucher, is endorsed in stamp: "Pay to the order of the Illinois Trust & Savings Bank. The Chicago & Alton R. R. Co. H. E. R. Wood, assistant treasurer." Also on that is the stamp marked "Paid through Chicago Clearing House, May 1st, 1909," I believe it is, or the "16th"—to the "Illinois Trust & Savings Bank." Another stamp is on there "The Commercial National Bank of Chicago," somebody, "cashier." Paid "March 30th, 1909," through, I think, "Clearing Mail" or through "Clearing House Mail,"—through the clearing——

Q. Can you make that out?
A. That was mailed, I think.
Q. Paid through the mail, through the mail?
A. Yes.

Mr. MCSHANE: There is -nother stamp on there, "Chicago, Burlington & Quincy, audit of expenses, Chicago. This receipt that you signed, you will notice is for "received in full of the above account,

as per statement and bill. Now, we have a bill here. You don't know where the statement is, do you?

A. No, sir.

129 Q. You don't know whether the statement I hand you is the statement referred to in there or not, do you?

A. No sir.

Q. When you signed this receipt and deposited the—when you signed this receipt for the Alton road had it apparently—did you look into each of these accounts before you signed them, or did somebody else do that?

A. Somebody else did that.

Q. In other words, when they put them on your desk they were supposed to be all correct?

Mr. EVERETT: I object to that "supposed to be."

Mr. MCSHANE:

Q. Well, in your work——

Mr. EVERETT: That is a matter of argument.

Mr. MCSHANE: All right.

Q. In your work you signed many receipts, didn't you?

A. Yes, sir.

Q. Was it your individual work to look at them to see if the bills for which the receipt was given was correct, or was that taken care of by somebody else?

A. Taken care of in another department.

Q. Before it reached you?

A. Yes sir.

Q. So that when it reached you in the usual course of events you supposed it was all right.

Mr. EVERETT: I object to that "supposed to be all right."

Mr. MCSHANE: That is all, that is all.

Mr. EVERETT: That is a matter of argument. That is all.

(Witness excused.)

130 RICHARD SWEENEY, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. McShane, and testified as follows:

Q. What is your name?

A. Robert Sweeney.

Q. You are a brother of Mr. Sweeney who testified here yesterday, are you?

A. Yes sir.

Q. You were subpœnaed down here?

A. Yes sir.

Q. What is your business, Mr. Sweeney?

A. Railroad clerk.

Q. For what road?

A. C. B. & Q.

Q. Where are you located?
A. 16 Canal street.
Q. In what department?
A. Superintendent's office.
Q. How long have you been there?
A. About eight years.
Q. What, if anything had you in your work to do with statements rendered to the Burlington by companies for trackage?
A. I checked them——
Q. Were you your brother's assistant?
A. Yes sir.
Q. During his absence you sometimes took his place, is that it?
A. Yes sir, acted in his place.
Q. I will ask you to look at this document I hand you and ask you if you can find your signature on there?

(Counsel hands document to witness.)

A. Yes sir.
Q. Where is it?
A. Right there (indicating).
Q. Do you know whether your brother was away at that time?
A. Yes sir.
131 Q. "Checked by R. J. S."

Mr. EVERETT: I object to counsel reading from that paper.
The COURT: Objection sustained.

Mr. MCSHANE:

Q. Below the—now there is a check mark here where your signature is, and a date "3/15/09" is that right?
A. Yes sir.
Q. Now then, below that there is in lead pencil "O. K."

Mr. EVERETT: I object to counsel reading that.
The COURT: Objection sustained.
Mr. MCSHANE: Here is a lead pencil mark on it.
Mr. EVERETT: I object to him doing the same thing over.
Mr. MCSHANE: I am not reading it. This lead pencil writing——
Mr. EVERETT: You would have the whole thing in.
Mr. MCSHANE: What is that. I am not running counter to the objection.
Mr. EVERETT: The court has sustained the objection.
Mr. MCSHANE: Not to this.

Q. Right below the check mark there is lead pencil writing and a signature.

Mr. EVERETT: I object to that, the document speaks for itself.
Mr. MCSHANE: It is not in evidence.
Mr. EVERETT: That is the reason you ought not to get it in evidence until it is admitted.
Mr. MCSHANE: I am trying to make it proper.

Mr. EVERETT: That is not the way to do it.
Mr. MCSHANE: I want to know whether——
Mr. EVERETT: You can ask him about all the endorsements on the paper, ask him what he made.
The COURT: Let the witness identify it. Is there something by which he can identify it?

132 Q. I want to know whether you also wrote this lead pencil writing below that, did you (indicating)?
A. Yes sir.
Mr. EVERETT: I object.
The COURT: He may answer.

A. Yes sir.

Mr. MCSHANE:

Q. You wrote that?
A. Yes.
Q. And the signature there, Johnson's signature with "S." under, is that your initial?
A. "S.," yes sir.
Q. Did you have authority to sign it for this man?
A. Yes sir.

Mr. EVERETT: I object to that. You cannot prove an agent's authority by his own declaration.
Mr. MCSHANE: In the regular course of business.
Mr. EVERETT: I move to strike it out.

Mr. MCSHANE: In the regular and ordinary business were you accustomed to sign this man's signature?
A. Yes sir.
Q. What was his business?
A. Which one, you mean Johnson?
A. Yes, Johnson.
Q. He was superintendent at that time?
Q. Do you remember the circumstances under which that statement——
A. I do.
Q. Well now, tell the jury all you remember of the circumstances, how you first got it and what was done with it, and all about it.
A. This statement was received from the C. & A.

133 Mr. EVERETT:

Q. Did you personally receive it?
A. No, not I personally.

Mr. EVERETT: I move his answer be stricken out.
The COURT: Yes, the answer may be stricken out.

Mr. MCSHANE:

Q. In your department were you accustomed in receiving statements from the C. & A. and other roads?

A. Well, Johnson was in charge of the department.
Q. Yes.
A. I was helping him.
Q. Yes.
A. In the course of events when the correspondence would be attached to this (indicating).
Q. Yes.
A. I would get this (indicating), for instance, and in entering it in our own records——
Q. Yes.
A. That was for our own information.
Q. Yes.
A. This statement had made several trips to the C. & A. for correction.
Q. Yes.
A. It originally called for six cars.
Q. Yes.
A. And it should have been for five.
Q. Yes.
A. The statement was corrected by the C. & A. to read five cars.
Q. Yes.
A. And he was not there at the time when this statement came back with this correction.
Q. Yes.
A. I knew that was what the statement had been sent back for, to get the correction.
Q. Yes?
A. I then certified to it as correct.
Q. That is your signature there (indicating)?
A. This is my signature here (indicating), and this is the superintendent's signature (indicating), which I signed.
Q. When you did that was it sent back to the C. & A.?
A. Sent back to the C. & A. then. It was ready for their bill to be attached to them.
Q. In the ordinary course of events when a road sent a charge, had a charge against the Burlington for trackage—what was the first thing that they would send?

134 Mr. EVERETT: I object to that.
The COURT: The objection will be sustained.
Mr. MCSHANE: Upon the Alton, I will ask you whether it was or was not the custom for the road first to send a statement and after the statement was sent back correct, then to send a bill with the statement.
Mr. EVERETT: I object to the question.
The COURT: The objection will be sustained. Let him tell the ordinary method.

Mr. MCSHANE:

Q. What was the ordinary course of events in a matter of this kind?

Mr. EVERETT: By "events", you mean business?
Mr. MCSHANE: Yes.

A. The statement would be sent to us, that is the C. B. & Q.
Q. Yes.
A. We would check the statement, and if it was O. K., we would return it certified. What we call certified is when that statement "correct" is marked on there.
Q. Yes.
A. Marked "O. K."
Q. And then what?
A. Then it would be returned to the C. & A.
Q. Yes, then what?
A. They would return their statement with the bill attached to that.
Q. Yes. Then what would be done?
A. We would O. K. the bill then or the voucher.
Q. Yes. Then what would be done?
A. The bill and statement would be sent into the superintendent's office for a voucher.
Q. Yes. Do you know whether this bill and statement are the same thing?

Mr. EVERETT: Are what?
135 Mr. MCSHANE: Whether the bill and statement refer to the same transaction?
Mr. EVERETT: I object to the question, making a comparison.
The COURT: Let him answer, if he knows.
Mr. EVERETT: Exception.
To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. Whether the bill and statement refer to the same transaction, do you know whether they do or not?
A. Yes, I know that this is the bill that should accompany this statement from the C. & A. after it was certified.
Mr. MCSHANE: Yes. I offer this in evidence, if the court please.
The COURT: It may go in.
Mr. EVERETT: May I ask a question about it before the court permits it to go in?
The COURT: Yes, I got ahead of myself. I beg pardon. That remark of the court, as to it going in will be stricken out for the time being.

Mr. EVERETT:

Q. You did not mark it. Will you mark that for identification?

Mr. MCSHANE: Yes, I will mark it "E for identification."
(Said document was thereupon marked "Plaintiff's Exhibit E for iden.")
Mr. MCSHANE: This is the statement, isn't it, that I showed to his brother yesterday, and he said that he was absent, you know, but that was his brother's signature, that is the same one, isn't it?

Mr. EVERETT: Yes, I think so.
136 Mr. MCSHANE: For the purpose of connection.
Mr. EVERETT: Yes.

Cross-examination.

By Mr. EVERETT:

Q. This statement, "Plaintiff's Exhibit E for iden.," is not made out in your handwriting?
A. The statement is not made out in my handwriting, no, sir.
Q. The only thing you know about it is the stamp reading "checked by R. J. S."?
A. And the signature.
Q. And the signature, "F. L. Johnson?"
A. Yes.
Q. Do you know of your own personal knowledge that you ever saw this statement before?
A. I do.
Q. Merely because the signature is on it?
A. That, and also because our records show that I handled the bill before.
Q. And the records are the records of the cars that move over the Chicago & Alton tracks. are they?
A. The records that I refer to are our records, our personal records of bills.

Mr. MCSHANE: Read the answer.
(Answer read.)

Q. You didn't keep those records?
A. Yes.
Q. Are they in existence?
A. Yes.
Q. Those records were made up from the conductors' time books, were they not, train books?
A. The statements I referred to or the records I referred to are made up from the time we receive a statement—for instance, if we send it back to the C. & A., we took a record of what date and what date we would get it back and so on—it is the record——
Q. This record——

Mr. MCSHANE: Wait, let him finish.
137 The COURT: Go ahead.

A. It was a record for our own information to know where our bills were.
Mr. EVERETT: Where is that record?
The WITNESS: 16th and Canal street.
Q. That was made by you?
A. Yes.
Q. And is in existence?
A. Yes.
Q. When you received this bill, you compared it with your records, didn't you?
A. In the first place——

Q. When you received this bill, you compared it with your records, didn't you—did you or did you not?
A. We had no record of it.
Q. Will you answer that question, if you can.

Mr. McSHANE: He has answered it.

Mr. EVERETT: When you received this bill, did you or did you not compare it with your records?
A. At what time do you mean?
Q. At any time?
A. No, I would not compare it with our records.
Q. Before yo ucertified it, didn't you compare it with some of your records?
A. No.
Q. You certified them without looking it up or checking it up in any way?
A. I know from the correspondence——
Q. I asked you if you certified them without looking it up or checking it up in any way?
Mr. McSHANE: He said he looked at the correspondence.
Mr. EVERETT: Did you?
A. I knew from the correspondence that it was correct.

Mr. EVERETT: I move to strike that out as not responsive.
138 Mr. McSHANE: I think it is your Honor.
The COURT: It may stand.

Mr. EVERETT:

Q. Had you at any time compared this bill with your records?
A. I can't answer that question yes or no.
Q. When you got the information that the bill was incorrect, you got that information from your records, did you not?
A. Yes, from our car records.
Q. Car records are the records that are made up from the conductors' train books, are they not?
A. Yes, from the conductors' train books.
Q. Are the conductors' train books in existence?
A. I think they are.
Q. At 16th and Canal stre-t?
A. Yes, sir.
Q. This is the first entry that is made of the cars is it not, for which you were charged?
A. Yes, sir.
Q. From there it is copied into another book, isn't it—from the conductor's train book, it is copied into another book?
A. Yes.
Q. What do you call that?
A. Car record book.
Q. That is in existence?
A. Yes.
Q. At 15th and Canal street?
A. Yes.
Q. That is the second entry that is made of those cars?
A. Yes.

Q. When you compared the statement with your car records, which record did you compare it with, the car record or the conductor's book?

A. You understand——

Q. Do—did you compare it with the car record or the conductor's book?

A. You understand——

Q. Not what I understand—did you compare it with the
139 car record or the conductor's book, or either of them.

Mr. McSHANE: Or something else?

Mr. EVERETT: Yes, or something else.

A. I cannot answer that question.

Q. Did you make any comparison with either of those books, to ascertain the correctness of the bill?

A. No.

Q. What did you look to *be* ascertain whether the bill was correct or not?

A. I didn't check that bill.

Q. Then you do not know whether this bill is correct or not, of your own personal knowledge?

A. Not of my own personal knowledge.

Q. You are going by some correspondence that was carried on by other people?

A. Yes.

Q. And that is the only information you have on the subject?

A. Yes.

Q. You didn't have any personal information as to the ultimate fact as to whether the bill was correct or not?

A. No.

Q. The only reason you say this bill is for the same cars mentioned on the statement bill, marked Defendant's Exhibit E for identification, and the bill which has not been marked——

Mr. McSHANE: You have marked "F" on there.

Mr. EVERETT: On the statement.

Mr. McSHANE: No, not on the statement, on the bill of the C. & A.

Mr. EVERETT: Yes.

Q. The only reason you say the statement marked "Plaintiff's Exhibit E and Plaintiff's Exhibit F" refer to the same cars is only by comparison you have made here in court, isn't that true?

140 A. Well, I know——

Q. Is that true or not?

A. Yes, that is right.

Q. You didn't make out the bill, marked "Plaintiff's Exhibit F," and you did not make out the bill marked "Plaintiff's Exhibit E," you merely took them, because they are presented here, and they referred apparently to the same matter, and upon that you based your answer, isn't that true?

A. I know them from my records.

Q. You haven't those records here?

A. No.

Exhibit E.

The Chicago &
St

GROVE STREET

1908 DATE.	WEST. ENG.	CARS.	INITIAL.	DATE.	EAST. ENG.	CARS.	INITIAL.	DATE.	C
Dec 15	Eng 1516	6	L.t.						

Eng over Storage Tr

6 Coaches.

W. Light

Total 1 6 1

2 Engines @ 4 cts per ~~mile~~ ~~7.29~~ 8.00

5 Cars. 1.00

~~Total~~ ~~7.00~~ 1.50

Checked by R.R.C.
For C.B. & Q. R.R. Co.
Dec 15 09

O.K. for 2 Engs. 6 Cars.

H. L. John

3006
D.F.M.

Form 349. 500. 5-07. Plff's Exhibt "E"

The Chicago&Alton Railroad Company
Statement of.....R.R.CO'S ENGINES AND CARS.
Passing over C.& A. Tracks in Month of.....1908.

DATE.	EAST. ENG.	CARS	DATE.	BRIDGEPORT West CAR.	ENG.	INT.	DATE.	EAST. ENG.	CAR.	INITIAL.	DATE.	BRIGHTON PARK EAST ENG.	CARS.	INT	DATE.	EAST. ENG.	CARS.	INT.

Q. Those records are kept by persons other than yourself?
A. Yes, sir.

Mr. EVERETT: I object to the introduction of "Plaintiff's Exhibit F" and "E." No competent proof has been made, and it is not the best evidence, and it is not the original entry, and I ask to exclude "Plaintiff's Exhibit F."

Mr. MCSHANE: The other man's signature is on this. Of course, I understand, if the court please, about the best evidence and the primary evidence, but we are not trying to show necessarily the correctness of this thing by his records at all. We are trying to show the fact that the Alton sent this statement to the Burlington, and we have shown that that statement was afterwards followed by the bill, which was paid. I don't care whether it is correct or incorrect. I do not try to make that proof by this man.

The COURT: I think the court understands what you are driving at. I presume that those are C. & A. statements.

Mr. MCSHANE: Yes.

141 The COURT: And the C. B. & Q. voucher.

Mr. EVERETT: It makes no difference what they are trying to prove. The law is that they must prove it by the best evidence, or account for their neglect to produce it. It has been shown here that the best evidence is in existence.

The COURT: So far as the statement is concerned, it may go in. Just how far it may affect the case, I don't know.

Mr. MCSHANE: I offer those in evidence.

Mr. EVERETT: I object to the introduction.

The COURT: Those two instruments may come in.

Mr. EVERETT: Exception.

Mr. MCSHANE: This is the third one.

Mr. EVERETT: My motion was to exclude "Plaintiff's Exhibit F," which the court has already admitted. That is the bill. My other motion is, I object to the introduction of Plaintiff's Exhibit E for identification. That is the voucher.

The COURT: This is the one that I admitted.

Mr. EVERETT: Here is the receipt.

Q. Are you familiar with the interlocking system at Grove street?
A. No, sir.
Q. You know there is one there?
A. Not of my own personal knowledge.
Q. Don't you know that there is an interlocking system at Stewart avenue and Grove street that is maintained by the Chicago & Western Indiana Railroad Company?

Mr. MCSHANE: I object to that.

Mr. EVERETT:

Q. Do you know that to be a fact?
A. No, sir, I don't.
Q. Have you not received bills for the maintenance of that interlocking system?

(Here follows bill of lading marked page 142.)

143 A. Not that I know of.

The COURT: These may come in.

Mr. EVERETT: Exception to the ruling.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

The COURT: They may come in.

Said documents so offered and received in evidence are attached to pages 137B and 137C of the Bill of Exceptions.

Mr. MCSHANE: I will read this, gentlemen. This is the document marked "Plaintiff's Exhibit E for identification," which the court has admitted in evidence.

"Chicago & Alton Railroad Company.

Statement of Chicago, Burlington & Quincy R. R. Co., engines and cars passing over C. & A. tracks in the month of December, 1908." There are three divisions, apparently, one called Grove street and Bridgeport and Brighton. Under the grove street division, follows the entry date, "1908, December 15th, Eng. 1516 to 16th street, over storage Tr., 6 coaches," and in the line below that is "h. light," that means home light, doesn't it?

A. Yes.

Q. "Total, 1 engine, 6 cars, and "one" under the "home light." Under the total" is written down here "2 engines, 40 cents, 80 cents, 5 cars" was originally written "6," and the "6" is stricken out—5 cars, "20 cents a car, $1.00, total $1.80," and under that are the signatures.

GEORGE MCCULLOM, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. McShane and testified as follows:

144 Q. What is your name?

A. George McCullom.

Q. How old are you?

A. 28.

Q. And your business?

A. Switchman.

Q. For what road?

A. For the Chicago & Alton.

Q. How long have you worked for the Chicago & Alton?

A. About nine years off and on.

Q. You were subpœnaed last night, weren't you?

A. Yes, sir.

Q. Where were you employed on December 15, 1908, or along about that time?

A. Known as the Fort Wayne junction on the C. & A.

Q. What is that?

A. Known as the Fort Wayne junction on the C. & A.

Q. Is that at Grove street?

A. Yes.

Q. Who were you working for then?
A. I was working then for Mr. E. B. Casey.
Q. For the Chicago & Alton?
A. Yes.
Q. How long did you work at that place—how long did you work there altogether?
A. I don't just remember that.
Q. About how long?
A. I had worked there three different times, and I couldn't tell you.
Q. A matter of six months all told or a year or what?
A. Possibly a year at a guess, I do not know exactly.
Q. What was your work at that place, in December, 1908?
A. At that time, why, I was number grabber and switch tender.
Q. What do you mean by "number grabber"?
A. Taking numbers and initials of cars passing up and down the main line of the Chicago & Alton.
Q. What else?
A. Throwing switches and answering the telephone.
145 Q. What other cars, if any, did you keep numbers of or names?
A. Cars—what do they call that track?
Q. For what track?
A. The Salt Dock track and the storage track. It is known as the Salt Dock track.
Q. I will call your attention to the photograph that is marked "Plaintiff's Exhibit A for identification," can you see the storage track that you spoke of on that photograph?
A. Yes.
Q. Where is it?
A. The Salt Dock——
Q. Not the Salt Dock, the storage track?
A. The storage track?
Q. Yes.
A. The storage track is this track right here (indicating).
Q. Is it the track that is marked with the lead pencil cross in the center of it, the circular track.

Mr. EVERETT: He pointed to the other track.
Mr. MCSHANE: No, he didn't.
Mr. EVERETT: See if he did.
Mr. MCSHANE: Look at it carefully.

Mr. EVERETT: Tell us which track.
A. This track here—to the east as I understand it is the storage track.
Mr. MCSHANE: Take your pencil and follow around the course of that track?
A. That track (indicating) leads around to the storage track, the "Y" there, and the track to the west of it is known as the storage track.
Q. What is this track, this curved track on the left hand side of

that semiphore pole, as we look at it, looking towards the elevator, the one that the cross mark is on the center of,—what is that track?

146 A. That track is a "Y" leading around from the storage track on to the Fort Wayne track.

Q. It is one end of the storage track?

A. Yes.

Q. What work, if any, did you do, with reference to keeping the numbers of cars passing around that "Y"?

A. Yes, sir.

Q. What did you do?

A. I got the numbers and initials of the cars.

Q. You got the numbers and initials of the cars, of all engines and cars passing around that "Y".

A. Yes.

Q. What did you do with them?

A. Made a record of them in a book.

Q. Now, if an engine or train going from the Pennsylvania—that is over the Fort Wayne—and the Western Indiana, they would follow that "Y", would they, until they got—until this freight track marked "D", and then they would go down that track until they struck the Western Indiana, is that right?

Mr. EVERETT: I object to the form of the question.

The COURT: Sustained.

Mr. MCSHANE: You tell the court what the engine would follow, going from the Fort Wayne to the Western Indiana?

A. That is the general movement, yes, sir.

Q. As I have stated?

A. Yes, sir.

Q. Let us see, if we get that right. This straight track that I speak of is—is the one on the right of that semiphore post.

A. That the "Y" leads on to it?

Q. Yes.

A. Yes, sir.

Q. In other words, they come around this "Y", to this

147 straight track, and down the straight track until they struck the Western Indiana, is that right?

A. Yes, sir.

Q. In other words, they would leave the storage track where it intersects——

Mr. EVERETT: I object to the question.

The COURT: Yes.

Mr. MCSHANE:

Q. Where would they leave the other track?

A. I would have to look at that.

Q. It would be where it struck that straight track?

A. It would leave that track, if it was making a delivery to the Western Indiana track.

Q. Yes, that is what I mean. So that the only track upon which

you kept account of cars going around from the Fort Wayne to the Western Indiana was upon this curved track to the point where it struck the straight track?

Mr. EVERETT: I object to that question as to its form.
The COURT: The question is leading.

Mr. MCSHANE: Let me ask you this please—take this straight track now that is marked C on the photograph and extends right across here and apparently joins this curved track just before it strikes the straight track, that straight track connects with the Alton main track doesn't it?

A. Yes.

Q. What name has that track, if any?

A. I never knew it to have a name any more than it is connected with the main track.

Q. And there is a cross over connecting this storage track and that straight track just before they strike that other straight track which you would follow going down to the Western Indiana, is that right?

148 A. Yes.

Q. Was there any other route there that you knew of from the Western Indiana—no, from the Fort Wayne or Pennsylvania around to the Western Indiana except around this curved track?

A. I don't know. *Q.* That is the only one I knew of.

Q. That is the only one that the Alton kept any record of?

A. Yes.

Mr. EVERETT: I object to that.
The COURT: Objection sustained.
Mr. EVERETT: I move to strike out the answer.
The COURT: The answer is stricken.

Mr. MCSHANE: *Q*as there any other track so far as you knew of which the Alton kept track of the movement of cars except this circular track?

Mr. EVERETT: I object to that.
The COURT: Sustained.

Mr. MCSHANE: What track did you, while you were a number grabber there for the Alton, keep track of the movement of cars from the Fort Wayne or Pennsylvania to the Western Indiana in passing over any other track except this storage track?

A. The salt dock track.

Q. Where is the salt dock track? Is it shown in the picture?

A. These two lines that parallel each other there.

Q. Where, please?

A. This track leading over here.

Q. Yes.

A. And the outside track here, and this track next to it. One is known as the salt dock track and the other one as the storage track.

149 Q. You kept account of cars passing from this straight track, from the Alton that you have spoken of, and where is this other track?

A. This Y leads on to one here.

Q. Yes.

A. And the other track lies west of it.

Q. Does it show in the picture?

A. Yes, sir, it should, there is the track right there. There is one and there is the other one leads around the Y, and they both lead into this track straight across here.

Q. Now looking at this bridge, those are the Pennsylvania tracks, aren't they, going over that bridge?

A. Yes.

Q. They run north and south?

A. They run north and south.

Q. And the two tracks right south of the bridge, curving off to the left as you look at the picture are the two main Alton tracks?

Mr. EVERETT: I object to that.

The COURT: He may explain.

Mr. EVERETT: He is proving the ownership by that.

Mr. MCSHANE: What is called—the tracks up which all the Alton trains run, are those the tracks that curve around that bridge?

Mr. EVERETT: I object to that question.

Mr. MCSHANE: What are those two tracks that curve to the left south of that bridge?

A. I understand the drawing here of two tracks you have reference to are the main line of the C. & A. off the bridge.

Q. And the two tracks that continue right straight down from the bridge are the Pennsylvania?

A. East and west bound of the Fort Wayne.

150 Q. East and west bound of the Fort Wayne?

A. Yes.

Q. That salt dock track, is that going to a salt dock or what?

A. No; that was before my time, but I understand at one time that that track was used as a main line for something, I couldn't explain it to you.

Q. Do you remember the date that this C. B. & Q. switchman was hurt there?

A. I have got a faint recollection of the day.

Q. You were on duty that day?

A. Yes, sir.

Q. Have you the books on which you made the entries that day?

A. No.

Q. Where is the book?

A. I left the book in the office.

Q. The Chicago and Alton office?

A. Yes.

Q. Where is it?
A. At 21st and Grove street.
Q. Do you remember of this Burlington train going around that storage track that day?
A. Well I just—I don't remember the movement of the train, but if it is on the books they must have made it.

Mr. EVERETT: What was that answer?
(Answer read.)
Mr. EVERETT: I move to strike that out.
The COURT: It may be stricken.

Mr. MCSHANE: If the Burlington train went around this storage track from the Fort Wayne to the Western Indiana you made a note of it, didn't you?
A. That is every one I saw, yes, sir.
Q. In other words that was your business there?
A. Yes, sir.
151 Q. And you would make a note of the number of the engine?
A. The number of the engine and the initials and numbers of the cars if it was possible to get them.
Q. If it was possible to get them, if not, just so many cars, is that right?
A. Just so many cars, and some I never saw at all.
Q. Some got away from you?
A. Yes.
Q. When that engine would come back light you would charge that up again, yould you?
A. Yes.
Q. And at the end of the day or the week, or what was it, you would make a report to headquarters of the number of engines or cars that passed over there, what was it?
A. Every month.
Q. In a general way, about how many cars would pass over that storage track every month?
A. I couldn't say.
Q. Well, in a day about what would they run, fifty, one hundred, or ten or one or what, just average it?
A. I don't remember the amount.
Q. Were there a great many or only a few.

Mr. EVERETT: I object to that as too indefinite.

Mr. MCSHANE: What different roads used this storage track in making that turn from the Fort Wayne to the Western Indiana?
A. Well, there was several roads. Mostly any foreign engine would come and in order to make that delivery would use the track.
Q. What kinds of cars were hauled over there?
A. All kinds of cars.
Q. Baggage cars, freight cars and engines and everything, is that right?

152 Mr. EVERETT: I object to the form of the question as argumentative.

Mr. MCSHANE: He has said all kinds went over.

The COURT: Sustained.

Mr. MCSHANE: Was there a man there at night who kept track of the cars that moved over that track?

A. Yes.

Q. Was he a C. & A. employee?

A. Yes sir.

Mr. EVERETT: I object, it calls for the conclusion of the witness.

The COURT: If he knows he can tell.

Mr. MCSHANE: He is here, isn't he?

A. I suppose he is.

Q. Did you ever work there at night?

A. Yes.

Q. Did you ever take his place, or did he ever take your place?

A. I worked there before he did.

Q. What is that?

A. I worked there before he did.

Q. How long, to your knowledge, did the C. & A. keep a record of the engines and cars that passed over that third track, how long to your knowledge?

A. I don't know.

Q. Did they all the time you worked there?

A. All the time I was there, yes.

Cross-examination.

By Mr. EVERETT:

Q. What duties did you have to perform besides keeping the car records.

Q. I had to attend to the switches and keep numbers and initials of cars going down the main line.

153 Q. This book you say you have not seem since 1908, have you?

Mr. MCSHANE: He didn't say that.

A. I have not seem it since I left.

Q. That was in 1908?

A. That I could not swear to—whenever I left. I don't remember the date it was.

Q. You don't know what has become of it?

A. No.

Q. Do you know what railroad company owns this track that you speak of that connects the Western Indiana with the Pennsylvania?

Mr. MCSHANE: Wait, wait, wait. That is a conclusion, your Honor.

Mr. EVERETT: I asked him if he knew.

The COURT: If he knows?

A. No sir, I don't know.

Mr. EVERETT: There are a number of railroad tracks at that location, are there not?

A. Yes, several.

Q. How many about—east and west?

Mr. MCSHANE: Where?

Mr. EVERETT: In the vicinity of Grove street.

Mr. MCSHANE: Well, the picture shows.

Mr. EVERETT: I didn't know you were on the stand.

Mr. MCSHANE: No, I am not.

Mr. EVERETT: Pardon my back, if you were.

A. I would say—speaking of all main lines?

Q. Yes, I want to know how many tracks there are there?

Mr. MCSHANE: Within what radius?

Mr. EVERETT: East and west.

Mr. MCSHANE: For how far?

154 A. Approximately I would say between 18 or 20—that is taking in the entire plant.

Mr. EVERETT: There is a signal system maintained in that point, isn't there?

A. Yes.

Q. Who maintains that system, if you know?

Mr. MCSHANE: I object to that; it is not cross examination.

The COURT: The objection will be sustained.

Mr. EVERETT: Isn't it a fact that the Western Indiana Railroad Company are the owners of that track and the land that you have pointed out on the plaintiff's picture—Plaintiff's Exhibit A, the track that you say connects the Pennsylvania with the Western Indiana.

Mr. MCSHANE: I object to that, he says he didn't know.

Mr. EVERETT: If you know.

A. I don't know.

Q. I show you a photograph marked Defendant's Exhibit B for identification, is that a correct representation of the situation of the track that we have been asking about?

A. Yes, as far as I remember.

Mr. MCSHANE: Keep your voice up.

Mr. EVERETT: Which is the right hand side of that picture?

A. This side.

Q. Which way is that on the compass?

A. East.

Q. We will mark that with an E. What is the top of the picture?

A. North.

Q. I show you this photograph marked Defendant's Exhibit C for identification, is that a correct representation of the situation as it appears on the day of this accident?

155 A. Yes sir.

Q. Which way does that face—the top of the picture is which way?

A. North.

Q. Which is the right hand side of the picture.

A. East.

Q. East?

A. Yes sir.

Q. We will mark that with an E on the right hand side and at the top with N. I show you another Exhibit marked Defendant's Exhibit E and ask you if that correctly represents the situation at that point at that time substantially?

A. Yes sir.

Q. Which way is the top of that picture—what direction?

A. The top of that picture is southwest. That track leads around to the west.

Q. And the right hand corner of the picture—the lower corner is northwest is it, or northeast?

A. Northeast.

Q. On Defendant's Exhibit D do you see a tower shanty, do you?

A. Tower, yes.

Q. Is that where the operator of the semiphore and the signal system stood?

Mr. McSHANE: That is not cross examination, your Honor.

The COURT: Sustained.

Mr. EVERETT: Don't you know as a matter of fact that those car records where kept under an agreement with the Chicago Madison & Northern Railroad, Chicago Western Indiana, Pennsylvania, Chicago & Alton, Atchison, Topeka and Santa Fe, don't you know that to be a fact?

A. No sir.

Q. Do you know anything about it one way or the other?

156 A. No.

Q. It may be so, may it not, so far as you know?

Mr. McSHANE: I object to that. He don't know, your Honor. He was working for the Alton.

The COURT: Yes, the objection is sustained.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

C. J. REA, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. McShane, and testified as follows:

Q. What is your name?

A. C. J. Rea.

Q. You are working for me, are you, Mr. Rea?

A. Yes sir.

Q. Did you make some photographs of the tracks out there of Grove Street, of the Fort Wayne and Alton?

A. Yes sir.
Q. Have you got one of those photographs in your pocket?
A. Yes.
Q. I am looking for that one. I call your attention to the photograph marked Plaintiff's Exhibit A, I will ask you if you took that photograph?
A. Yes.
Q. When did you take it, Mr. Rea?
A. In August, 1909.
Q. Does it correctly represent the situation of the track and such like as are shown upon it?
A. Yes sir.
Q. And this white post?
A. Yes sir.
157 Q. That is marked E on the top?
A. Yes.
Q. Did you also take these other photographs that I hand you?

(Counsel hands photographs to witness.)

A. Yes sir.
Q. Is that a photograph of the same situation?
A. Yes sir.
Q. Does that correctly represent the conditions there?
A. Yes.
Q. I will mark this other one Plaintiff's Exhibit G. It shows just one little piece that the other does not. Did you make any measurements, Mr. Rea, in reference to the distance between this white post marked E, which we call the semiphore post and the rail on either side?
A. Yes.
Q. Have you got a memoranda with you?
A. Yes.
Q. What is the distance between the nearest edge of that semiphore post to the rail nearest it on this round circular track which we call the storage track and upon which there is a cross marked in the center.

Mr. EVERETT: I object to the question because the photograph and measurements were made over six months after the accident.
Mr. MCSHANE: We showed there was no charge, by the section foreman; that the conditions were the same.
The COURT: Overruled.
To which ruling of the court the defendant by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. What is the distance?
A. Four feet, three inches to the nearest rail.
Q. Four feet three inches to the nearest rail—between the post and the nearest rail of this circular track?

158 A. Yes.

Q. What is the distance between the edge of the post to the nearest rail on the other side?

A. Four feet, eleven inches.

Q. Now what is the distance—did you make the measurements at various distances north or northeast of that pole as to the distance between the tracks?

A. Yes.

Q. Tell us what they were?

A. Well, at a point five feet north or northeast of the pole there was ten feet and eleven inches between the two rails.

Q. That is the nearest rail of the two tracks?

A. Yes.

Q. What was the distance between the two rails at the post?

A. Ten feet.

Q. And there is eleven inches further—five feet back?

A. Five feet back.

Q. What did you make it at any other place?

A. Ten feet back there was eleven feet and six inches space.

Q. Ten feet back from the pole?

A. Ten feet back from the pole.

Q. What else did you measure?

A. And 15 feet back from the post there was 12 feet and two inches space between the two rails.

Q. And 20 feet back there was 13 feet between the two rails, and 30 feet back there were 13 feet six inches.

Q. Is that as far back as you went?

A. That is as far as I measured it.

Q. How far was it, Mr. Rea, if you made any measurements—I think this might assist you.

159 Mr. EVERETT: I object to his referring to a document unless you have identified it.

Mr. MCSHANE: Maybe he don't need any refreshing about it I don't know. From that post south to the frog marked here with the letter A, do you know what the distance was or is?

A. 43 feet.

Q. 43 feet?

A. Yes sir.

Q. Do you know what the distance was from the post to where this curved track intersects with that straight track called D in the other direction, or did you take any measurement?

A. No, I did not.

Q. You did not?

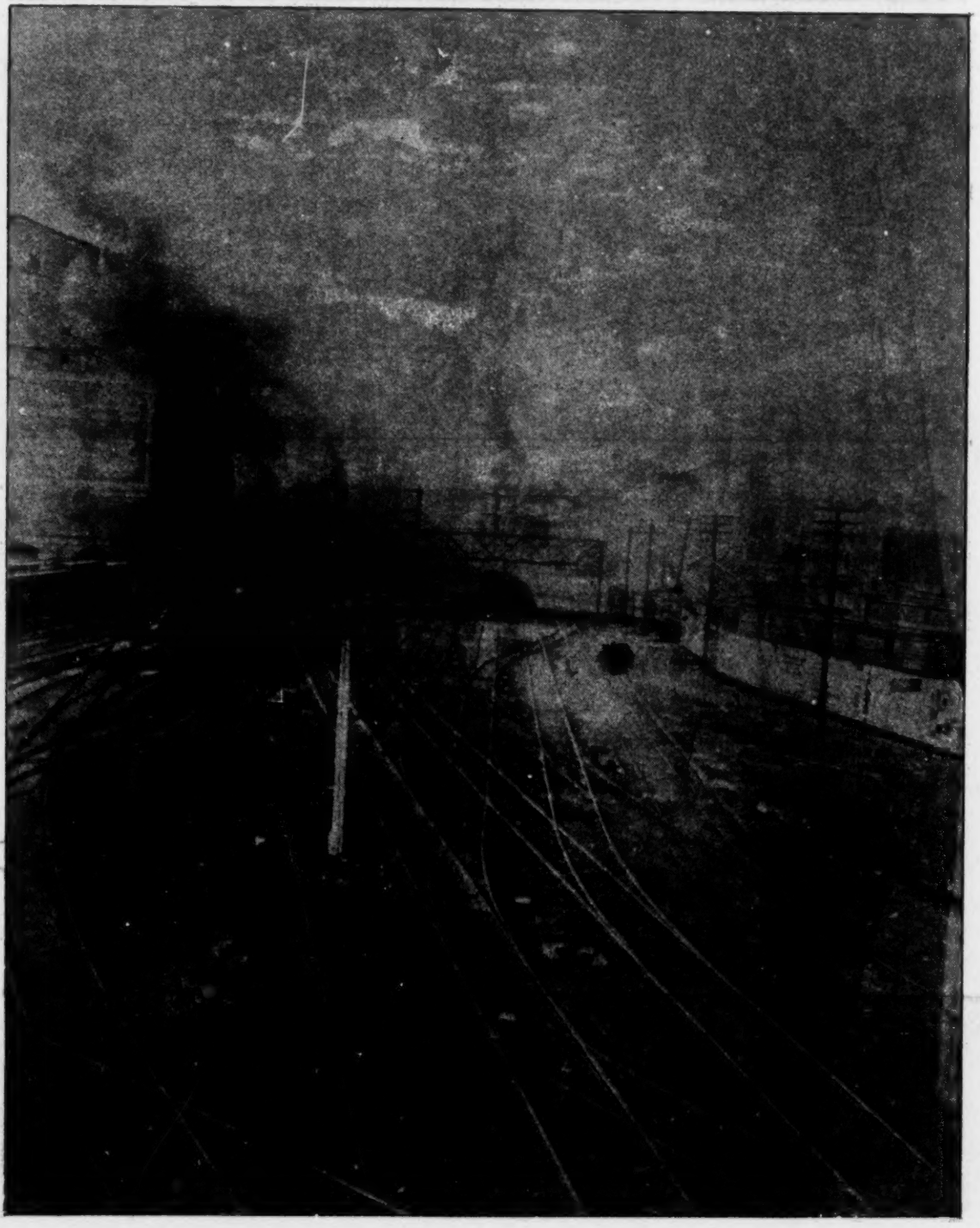
A. No.

Q. Did you take a measurement as to how far it was from that curved track?

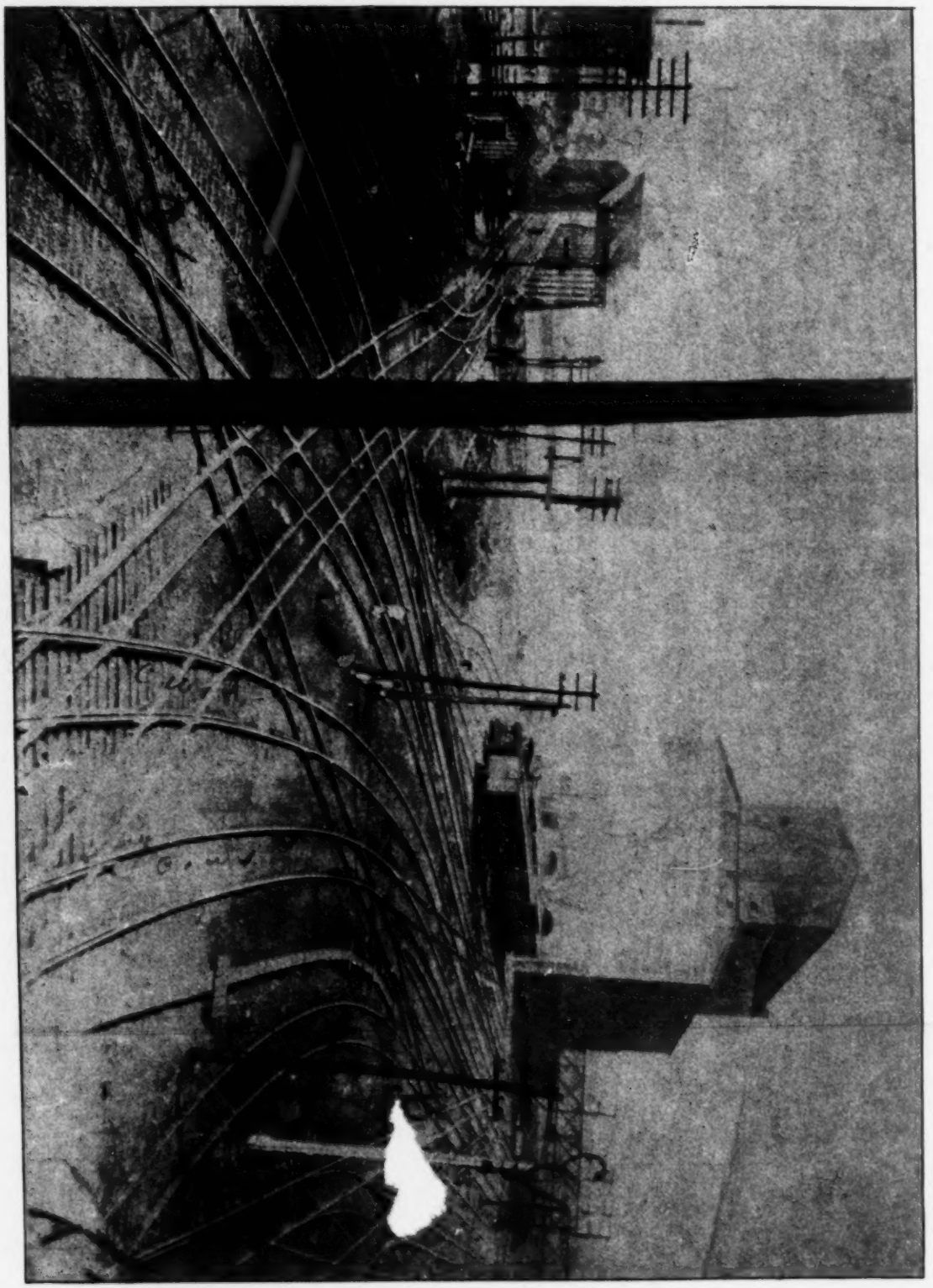
Mr. EVERETT: To the post around to where it joined the Pennsylvania—well, I don't care about that.

Mr. MCSHANE: We offer this in evidence. That has already been

Plaintiff Exhibit "G" for Identification



Plaintiffs Exhibit "A" for Indentification"



marked Plaintiff's Exhibit A for identification, and this other one that has already been marked Plaintiff's Exhibit G for identification. Is there any objection?

Mr. EVERETT: No.

Mr. MCSHANE: They are both introduced in evidence.

The COURT: If there is no objection they may come in.

(Photographs so offered admitted in evidence.)

Which Plaintiff's Exhibit A for identification so offered and received in evidence is attached to the next preceding page hereof and which Plaintiff's — G for identification so offered and received in evidence is attached to second preceeding page hereof.

(Here follow photographs marked pages 160 and 161.)

162 Cross-examination.

By Mr. EVERETT:

Q. How long have you been associated with Mr. McShane?
A. Pretty near six years.
Q. You investigate his cases, do you?
A. Yes sir.
Q. Subpœnae in his witnesses?
A. Yes sir.
Q. Take pictures of cases he is about to try?
A. Yes sir.

JOHN CONNELL, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. McShane, and testified as follows:

Q. What is your name?
A. John Connell.
Q. How old are you, Mr. Connell?
A. 45.
Q. And your business?
A. Switchman.
Q. Were you a member of Mr. Wagner's crew on the day of this accident, December 18th, 1908?
A. Yes sir.
Q. And you accompanied the crew from where they started with those cars to the place of the accident, did you?
A. Yes.
Q. What was the cars that you had hold of?
A. We had hold of five cars of silk, Great Northern cars.
Q. Do you know where they came from?
A. I couldn't say just where they came from but I suppose they came from the west.

Mr. EVERETT: I move to strike that out.
The COURT: It will be stricken.

Mr. MCSHANE: You didn't see the bills, or anything?
163 A. No.
Q. Did you see what the cars were loaded with?

Mr. EVERETT: He stated already.

Mr. MCSHANE: Did you see?
A. Yes, I seen one car transferred at Harrison street—part of the car.
Q. Do you know whether or not the custom officers were there when it was opened?

Mr. EVERETT: I object to it as immaterial.
The COURT: The objection will be sustained.

Mr. MCSHANE: Where were the cars delivered, Mr. Connell?
A. They were delivered to the Erie.

Q. When you got to this track that we have been calling the storage track upon which you were moving at the time when Mr. Wagner was hurt, as you started around there, where was the cars with reference to the entrance—was your engine pulling them or pushing them?

A. It was pushing them.

Q. Where were you on the train?

A. On the footboard of the engine.

Q. Engine heading or backing?

A. They were shoving.

Q. The engineer would be on the right hand side?

A. Yes.

Q. On the inside of the curve?

A. Yes.

Q. Were you on the right hand side, too?

A. Yes.

Q. Were there any platforms on the cars?

A. No, sir,—well there is a small platform, I should judge maybe four to six inches.

Q. Where was that?

164 A. Between the cars. There is simply a little platform, very small. It is not big enough for a man to stand on, that is, with safety. He would have to hold on to the brake.

Mr. EVERETT: I move to strike that out "it is not big enough for a man to stand on with safety."

The COURT: That may be stricken out.

Mr. MCSHANE: Well was it just merely the ledge of the car?

Mr. EVERETT: I object to that, let the witness describe it.

Mr. MCSHANE: Describe that platform.

A. As near as I can give it, the distance is about as wide as that. They are a little bit wider, probably. It may be a little bit wider that that.

Mr. MCSHANE: That is six inches.

Mr. EVERETT: What was it yesterday?

Mr. MCSHANE: Four and three eighths.

Q. Did that extend clear around the edge?

A. Yes; the width of the car.

Q. There is a sort of a rounding edge?

A. Yes, rounding.

Q. Were there also vestibule apparatus?

A. Yes.

Q. Where was Mr. Wagner as you went around there?

A. He was on the rear car.

Q. Which one do you mean, the rear and going around, or the forward end as you were going around?

A. The forward, I suppose, going that way.

Q. It was the head car as you were pushing around.

A. Yes; the head car.

Q. Which side of the train was he on?

165. *Q. Where was Mr. Wagner as you went around there?*
A. He was on the rear car.
Q. Which one do you mean, the rear end going around, or the forward end as you were going around?
A. The forward, I suppose, going that way.
Q. It was the head car as you were pushing around.
A. Yes; the head car.
Q. Which side of the train was he on?
A. On the right hand side.
Q. The same side you were?
A. Yes.
Q. What part of the car was he on?
A. He was back about 15 feet on one of those cars hanging on the side.
Q. Hanging on to what?
A. Those handles.
Q. Where was it with reference to the door?
A. Well the door is about 15 feet from the end.
Q. Was he at the door?
A. Yes, he was at the door.
Q. What was he standing on, if you know?
A. I think he was standing on the stirrup of the step.
Q. As he stood there, was one hand or both hands hold of one handle or both hold of the side of the door?

Mr. EVERETT: I object to the form of the question.
The COURT: Sustained, let him tell.

Q. Where were those handles that he held to?
A. Well I think he had hold of both sides as far as I remember.
Q. And the front of his body was which way, toward the car or from the car?
A. Towards the car.
Q. And you were on the platform?
A. Yes.
Q. Could you see the other switchman at all?
166 A. No.
Q. Do you know where he was?
A. Well I suppose he was on the hind end——

Mr. EVERETT: I move to strike out what he supposes.
The COURT: The objection will be sustained and the answer stricken out.

Mr. MCSHANE:

Q. You could not see him anyhow?
A. No, sir, I could not see him, you cannot see him with those cars.
Q. What did you see, if anything, about the accident, Mr. Connell?
A. Well, I seen Mr. Wagner when he got hit with the semaphore.
Q. Well, what did you observe him do, if anything?
A. Why, I certainly stopped the engineer——

Q. No, I mean did you see him before he was hit or just the moment, or just after or what?
A. I seen him when he got hit, he went through the post.
Q. Between the car and the post?
A. Yes, sir.
Q. At that time, was he hanging away out, or was he up against the car or what?
A. He was up against the car.

Mr. EVERETT: I object to the question.
The COURT: Objection sustained.
Mr. EVERETT: Will the answer be stricken out?
The COURT: Strike it out.

Mr. MCSHANE:

Q. Where was he, with reference to the side of the car, at the time he went between the post and the car?
A. Why, he was on the right hand side of the car.
167 Q. The question that I asked you and you answered has been stricken out, and we will have to go over that again? How close was he to the side of the car?
A. Well, he was——

Mr. EVERETT: I object—I think counsel ought to let this witness describe what he saw there, and then afterward, if there is anything he has omitted, let him fill that in, instead of making suggestions with each question.
Mr. MCSHANE: I am only directing his attention to the question of distance, that is all.
Mr. EVERETT: We are entitled to have—the jury is entitled to have the benefit of hearing what this man knows about it, in his own way at first.
The COURT: Proceed, Mr. McShane.

Mr. MCSHANE:

Q. Where did he stand, with reference to the side of the car, that is, as to whether he was out or in, or where?
A. He was in.
Q. What do you mean by "in?"
A. Why, he was close up alongside of the car.
Q. How close?
A. Well, I guess he was as close as he could stand.

Mr. EVERETT: I move that be stricken out.
The COURT: Yes, it will be stricken out.

Mr. MCSHANE:

Q. Now, what do you mean by that? Use some other words, how close was he, not as close as he could stand, but was he against it, or was he some distance away?

Mr. EVERETT: I object to the question.
The COURT: Objection sustained. Let the witness tell what he knows about it, and what he saw there.

Mr. McSHANE:

Q. How close was he to the side of the car?

168 Mr. EVERETT: I object to the form of the question.

The COURT: Objection sustained; let him tell what he knows.

A. Why, I think——

The COURT: Just a minute. The court sustains the objection, Mr. Witness.

Mr. McSHANE:

Q. Go ahead and tell us where he stood, with reference to the side of the car?

Mr. EVERETT: I object to that.

The COURT: He may answer.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

A. Why, he was right close up against the side of the car, as far as I could see, just as close as he could get up, as far as I could see.

Q. What happened to him, Mr. Connell?

A. Why, he went through the post and got hit and fell down, and I ran up to pick him up.

Q. How long after he hit the post——

A. What?

Q. How soon after hitting the post or passing the post did he fall?

A. Why, he fell right away.

Q. And where did he fall to?

A. Why, he fell on the north side of the post.

Q. What did you do then?

A. Why, I ran up after stopping the engineer, I ran up and picked him up.

Q. When you got up there, was there any part of the train opposite the post?

A. Yes, sir.

169 Q. What did you observe as to the space there was between the post and the side of the car that was then opposite the post?

A. Well, I should judge it was very close.

Q. Well, about how close?

Mr. EVERETT: I move it be stricken out.

The COURT: It will be stricken out.

Mr. McSHANE:

Q. The best you can in inches, to the best of your recollection?

A. Well, I should think, between eight and ten inches.

Q. About how close to the end of the car was that distance?

A. Well, that was in the middle of the car.

Q. That was not the car he was on though, was it?

Mr. EVERETT: I object to that form of question.

Mr. McSHANE:

Q. Was that the car he was on or was it some other car?

Mr. EVERETT: I object, let him tell what car it was.

A. Well, I should——

Mr. EVERETT: Just a minute——

The COURT: Objection sustained. Let him tell what he saw there.

Mr. McSHANE:

Q. Which car was it, Mr. Connell?

A. It was about the second car, Mr. McShane, we ran about a car length, and maybe a little over, before we stopped.

Q. Well, what did you do with him?

A. We picked him up and took him over to the switch tender's shanty.

Q. And after you got through there, did you go on your way, I mean did you later take the train on?

A. Yes, sir.

Q. Have you seen this picture, Mr. Connell (counsel hands photograph to witness)?

A. No, sir.

170 Q. Well, look at it closely, and see if you can point out that track you were on?

A. Well, I should judge this (indicating) would be the track, right over here (indicating), I should think, but I am not sure about it.

Mr. EVERETT: Mr. McShane, won't you conduct the examination so that every one can hear?

Mr. McSHANE: Well, you are not familiar with the picture then?

A. No, I am not.

Q. Had you been over that way before, Mr. Connell?

A. Yes, sir, once before.

Q. While you were with the Burlington?

A. Yes, sir.

Q. Do you know how long ago it was before that?

A. Well, it must have been some years ago.

Mr. EVERETT: How many years ago?

(Answer read.)

The WITNESS: Several years, I do not recall.

Mr. McSHANE:

Q. Do you remember any other semaphore post along that track, that curved track, before you reached this one?

A. No, sir.

Q. You don't know whether there was or not?

A. No, sir.

Mr. McSHANE: I think that is all.

Q. Well, what did you do with Wagner?

Mr. EVERETT: He told you. I object to that.
Mr. McSHANE: I didn't catch it.
Mr. EVERETT: He took him to the shanty.
Mr. McSHANE: Took him to the shanty.

171 Q. He was there, when you went away?
A. Yes, sir, he was.
Q. How did he get to the shanty?
A. Why, we carried him there.

Mr. McSHANE: That is all.

Cross-examination.

By Mr. EVERETT:

Q. Is that your signature to this statement? (Counsel hands statement to the witness.)
A. Yes, sir.
Q. That was made the day after the accident, wasn't it?
A. Yes, sir.
Q. The facts stated in that statement were true at that time, weren't they?
A. Yes, sir.
Q. The car, the number of the car that he was hanging on was express car 1664, N. P., Northern Pacific, isn't that true?
A. I believe it was, if I remember right.
Q. Isn't that a correct representation of the car (show- witness "Defendant's Exhibit C for iden.")?
A. No, the doors was not that way on the car. The doors was—it was a sixty foot car, and the doors was about 15 feet from this end (indicating), and about the same from the other?

Mr. McSHANE: What is that?
Mr. EVERETT: 15 feet from each end, he said the doors were.

172 Q. Where did you start from the day of this accident, with your train of five cars?
A. Harrison. We first went to the passenger yard, and then went down Harrison, and made a transfer down there.
Q. How far is that from the place where he was knocked off?
A. Harrison street?
Q. Yes.
A. Well, I should judge about two and a half miles.
Q. Mr. Wagner was the conductor in charge of this train and train crew, was he not?
A. Yes, sir.
Q. You followed his directions?
A. Yes, sir.
Q. Selected the route over which your train was to move?

A. Well, I guess so.

Mr. McSHANE: Wait a minute, I object to it.
The COURT: If he knows, he may answer that.

Mr. EVERETT:

Q. There were two ways of making a connection with the Erie, was there not?
A. Yes.
Q. One over the Air Line?
A. Yes, sir.
Q. And this way that you went?
A. Yes, sir.
Q. The Air Line was at 16th street, wasn't it?
A. Yes, sir.
Q. You had gone over that way many times?
A. Yes, a great many times.
Q. This train that you were working on, or the crew you were working with is known as a switching crew, isn't it?
A. Yes, sir.
Q. You merely switched the cars in the district around Chicago?
A. Yes, sir.
Q. You did not go outside the city of Chicago?
173 A. Only to Hawthorn, and such as that.
Q. You did not go outside the state of Illinois?
A. No, sir.
Q. And that had been so for a number of years, had it not?
A. Yes, sir.
Q. How long had Wagner been your conductor?
A. Well, at that time—I worked with him different times, but that time, I think I worked with him about two months.
Q. How long had he been conductor that you know of?
A. Oh, he has been conductor off and on—I guess, for probably a couple of years, according to how business was.
Q. Over what tracks did you go from your Harrison street yard up to the time that you turned on to this switch track that you spoke of?
A. The Fort Wayne.
Q. You used the Fort Wayne the entire way, did you?
A. Yes, sir.
Q. That is also known as the Pennsylvania?
A. Yes, sir.
Q. Did you go across the bridge?
A. Yes, sir.
Q. That is the bridge shown on this picture, I show you, marked Defendant's Exhibit C, is it?
A. Yes, sir.
Q. Came through towards the bottom of this picture?
A. Yes, sir.
Q. Then your train came to a stop, didn't it, so as to get the switch?

174 A. Yes, sir.
Q. Who turned that switch?
A. Why, that is worked with—it is interlocking.
Q. Interlocking switch?
—. Yes, sir.
Q. Who directed the man in the interlocking tower to turn the switch?
A. I couldn't say.
Q. It was the conductor's business to give the signals, wasn't it?

Mr. McSHANE: Wait a minute, I object to that, your Honor.
Mr. EVERETT: I think that is proper.
Mr. McSHANE: How it was done, I don't object.
Mr. EVERETT: I think it is proper to show whose business it was, whose duty it was.
The COURT: If he knows whether Wagner did it or not, he may tell that.
Mr. McSHANE: Or if he ever saw anybody else do it.

Mr. EVERETT:

Q. There was none of the brakemen or switchmen connected with your crew, that gave signals to the towerman besides Wagner, was there?
A. No, sir.
Q. He gave all of the signals and directions?
A. I didn't see him give any directions.
Q. What?
A. It ain't necessary to give signals, they know where you are going.
Q. Who notified the towerman where you were going?
A. Why, I suppose the man at 16th street.
Q. About two and a half miles away?
A. No, that ain't two miles and a half away.
Q. How far is it?
A. Well, it is about half a mile. The man would——
175 Q. Who notified the man at 16th street where you were going?
A. I suppose the man down at 12th street does that?
Q. Who notifies the man at 12th street?
A. Well, he knows when we are coming out.
Q. Who told the man when you come out?
A. I suppose Mr. Wagner, I don't know whether he did or not, I could not say as to that.
Q. Well, he had charge of the train, didn't he?
A. Yes, sir.
Q. There was no one else in your crew——

Mr. McSHANE: We will admit that Wagner directed this crew to go that way. What his directions were is another thing, but he was in charge of this crew going that way.
Mr. EVERETT: And that he gave the directions.
Mr. McSHANE: No, the towermen really——

Mr. EVERETT: Now, you have started to make an admission, and now you are taking it all back.

Mr. McSHANE: No, I am not. I say Wagner knew where he was to go, and told some of the towermen that is the way he wanted to go.

Mr. EVERETT: You admit that he directed the towermen to give him the switch, to let him on the track?

Mr. McSHANE: I understand that they approached——

Mr. EVERETT: You want to make an admission?

Mr. McSHANE: No. I say they knew, but he did not know just how to go.

Mr. EVERETT: What is the use of making an admittion, if you do not want to admit it?

Mr. McSHANE: They knew; he did not know just how to go.

Mr. EVERETT:

Q. The towermen, as you moved along, passed the signal along from one to another, which way you were going, is that it.

176 A. We pulled along the Pennsylvania track, and then we got the board and went on.

Q. Now, the towermen pass the signal to each other, do they, which way you are going?

A. I could not say as to that. I was only helping on this job. Mr. Wagner knows about that.

Q. Well, before you started on this curved track, shown on this picture, you came to a stop, didn't you, to wait for the switch?

A. Yes, sir.

Q. And what did Wagner do, when your train stopped there?

A. Why, I stood there——

Q. Yes.

A. We stood there—we got the board in two or three minutes, might have been a little longer.

Q. Your train stood still?

A. Yes, sir, until we got the board.

Q. How far back of the switch were you?

A. We had to go back to clear the semaphore.

Q. How far back of the switch were you?

A. How far back of the switch were we?

Q. Yes, when you were standing still?

A. Oh, half a car length, maybe a little more.

Q. A car length is how many feet?

A. Well, may have been sixty or forty, depending on the car.

Q. Didn't Wagner get off the car?

A. Yes, sir, he did.

Q. Did he go and talk to the switchman?

A. I saw him talking to the switch tender.

Q. To whom?

A. Switch tender.

Q. The switch tender?

A. Yes.

Q. Do you know what the switch tender came up for?
177 A. No, I do not.
Q. Did you see the switch tender throw the switch that permitted your car to go in on that siding?
A. He did not have to throw the switch, that was—that was done from the tower.
Q. What was the switchman doing there?
A. He was turning the switches on the Pennsylvania, hand switches.
Q. What part of the car did Wagner ride on, from the time you left Harrison street until the time you got up, at the point where you stopped?
A. Well, he rode on the engine until we got up there.
Q. Then he got down from the engine, went down?
A. Yes, sir.
Q. He was on the cab of the engine?
A. No, sir, he was——
Q. Was he on the footboard?
A. Yes.
Q. With you?
A. No, he was not with me. I was on the front footboard, and he was on the hind if I remember right.
Q. By the front footboard, you mean, in between the engine and the first car?
A. Yes, sir.
Q. And the cars proceeded ahead of the engine as you went northeast?
A. Yes.
Q. Did you start from Harrison street, is that where you made up your train?
A. No, sir, we started from the passenger yard. We went down and we transferred a part of one car down there.
178 Q. Passenger yard?
A. Yes sir.
Q. Where is that?
A. 16th street and Canal, or—not Canal but 16th and—I forget what they call that side street in there.
Q. How did Wagner ride on the train from 16th street on?
A. Well, he rode on the head end going down.
Q. The head end of the first baggage car?
A. I think he would be.
Q. Standing in the front part there on that rod that you have been talking about, standing in the front part there that you have been talking about?
A. No, I could not say, I did not see him going down, but I think he rode on the head car, on the end of the car.
Q. That car had a stirrup on it, hadn't it?
A. Yes, sir.
Q. It also had a truss underneath?
A. Yes, sir.

Mr. McSHANE: Do you mean the side of the car now?

Mr. EVERETT: A truss on the side, that is underneath on the side?
A. Yes, sir.
Mr. MCSHANE: Well, the stirrup, do you mean on the end or the side?
Mr. EVERETT: I did not ask—I suppose you noticed.
Mr. MCSHANE: I would like to know what he means by that.
The COURT: You may find out.
Mr. EVERETT: When the time comes.
The COURT: Yes, he has a right to examine him.

Mr. EVERETT:

Q. Do you know the number of that baggage car?
179 A. Well, I did know the number, but I have forgot it—I guess it is on that statement.
Q. Will your statement refresh your recollection, if I show you your statement?
A. Yes, if I will see it.

(Statement handed witness.)

A. I guess that must be the right number.
Q. That is 1664 N. P.?
A. Yes, sir.
Q. Meaning Northern Pacific?
A. Yes, sir.
Q. It was light?
A. Yes, sir.
Q. You could see anything that you looked at?
A. Yes, sir, the day was clear.
Q. Clear day?
A. Yes, sir.
Q. You could see this semaphore pole if you looked at it, couldn't you?
A. Yes, sir.
Q. Was there any other man on the head car, as you proceeded across this Grove track?
A. Yes, sir.
Q. Besides Wagner?
A. Yes, sir.
Q. Who?
A. Coleman.
Q. Where did Coleman stand?
A. Why, he stood there on the read end of that car. He had the gun, you know, we had air all the way through the train.
Q. He stood on the rear end. You mean the front end as it proceeded?
A. Yes, sir. He had to stand there, and hang on. He put his arm through the brake wheel, for to hang on, for to use the gun, in case——
Q. This is the brake wheel shown on this end of that car, isn't it (indicating)?
180 A. Yes, sir.
Q. Showing the witness "Defendant's Exhibit E"?

A. Yes, sir.
Q. That was the way that the head end of that car proceeded?
A. Yes, sir.
Q. That is, that is the way it was constructed?
A. Yes, sir.
Q. It had a hand hold there like that shown there (indicating photograph)?
A. I could not say.

Mr. McSHANE: Let him see that. Take a hold of it and look at it. Don't look at it forty feet away.
Mr. EVERETT: I object to counsel saying that.
Mr. McSHANE: I want the record to show that he stands about eight feet from the witness when he shows him that small photograph.

Mr. EVERETT: You could see it from where I was standing?
A. No, I could not see him at all.
Q. You could see what I was showing you when I stood there?
A. Oh, yes.

Mr. McSHANE: I object, he could not.
Mr. EVERETT: Well, he said he could.

Mr. EVERETT:

Q. Now, showing you this blue print, marked "Defendant's Exhibit E," up in the left hand corner appears to be the end of a car, doesn't it?
A. Yes, sir.
Q. That shows a wheel there, doesn't it?
A. Yes, sir.
Q. That was this brake wheel?
A. The brake wheel.
Q. That was this brake wheel that you have been talking about?
181 A. Yes, sir.
Q. And this—what was the name, Coleman?
A. Yes, sir.
Q. Coleman stood there with his arms through this wheel?
A. Through that brake wheel.
Q. With his feet on this ledge?
A. Yes, sir.
Q. Ledge about 4⅜ inches?
A. Well, might be a little wider, I couldn't say, it may be a little wider.
Mr. McSHANE: Louder, please.

Mr. EVERETT:

Q. Wasn't it as wide as this was?
The COURT: Talk louder so that the gentleman on the end can hear you.
A. Well, it may be probably six or eight inches at the very most.

Mr. EVERETT:

Q. Wide?
A. Yes, sir.
Q. That is what Coleman stood on?
A. Yes, sir.

Mr. MCSHANE: He has testified, your Honor, he did not see how Coleman stood. I object to that.
Mr. EVERETT: I object to counsel interrupting my examination.
Mr. MCSHANE: That he was at the end of the car and he could not see him at all.
Mr. EVERETT: Now, I object to that.

Q. Now, don't you remember that this end of the car had a hand-hold, that is shown in the picture, in the left hand corner?
A. I could not say.
Q. Do you remember whether it had this stirrup shown here (indicating on photograph)?
182 A. Yes, sir, I remember that.
Q. That was on the end of the car?
A. Yes, sir.
Q. By stirrup, you mean the iron that comes down and forms a step?
A. Yes, sir.
Q. Upon which a switchman or brakeman may stand?
A. Yes, sir.
Q. That was on the front part of the car as it proceeded?
A. Yes, sir.

Mr. MCSHANE: What is that last?
(Question read.)

Mr. EVERETT:

Q. It was not around the side?
A. Well, there are side steps, too.
Q. Was there one in front?
A. There was one in front, but there was also a side step.
Q. Also a side step?
A. Yes, sir.
Q. Was that up at the front corner of that car?
A. No, it is back a little ways.
Q. Back fifteen feet, as you have stated?
A. Yes, sir.
Q. Now, don't you know that Wagner, as he proceeded down there, was standing with his feet on the truss?
A. Well, that I could not exactly say. I thought he was standing on the step.
Q. He might have been standing with his feet on this truss, as shown in this Exhibit E, might he not?
A. Yes.
Q. Holding on to the hand-holds that were opposite the car door?

183 A. Yes sir.
Q. How wide was that car door?
A. How wide?
Q. Yes.
A. I should judge it is between three and a half and four feet, those doors.
Q. What was the height of them?
A. The height?
Q. Yes.
A. Well, maybe five or six feet, and maybe more.
Q. The doors stood back, didn't they?
A. Yes.
Q. How many inches in from the outside edge of the car, the outside side of the car?
A. Well, I should judge probably seven or eight inches.
Q. And had hand holds on either side of the doors?
A. Yes, sir.
Q. Did you see Wagner get on to this car?
A. Yes, sir.
Q. After you started from that switch?
A. Yes, sir.
Q. Had the car started to move when he got on?
A. Yes we just started up when he got on.
Q. It was in motion?
A. Yes, sir.
Q. And he grabbed hold of the grab-iron, did he?
A. Yes, sir.
Q. Or the handle?
A. Yes, sir.
Q. And threw himself up?
A. Yes, sir.
Q. And put his foot on this truss?
A. I guess either truss or step, I guess, I could not say it was one or the other, though.
Q. How far away from the semaphore that brushed him off, had this car stopped for the switch?
184 A. Well, after the switch, we ran about, probably a car length.
Q. No, I am asking you how far. Just think it out, don't think out loud. Just give us the distance, if you will.
A. After he got hit?
Q. No, how far was it from the semaphore that brushed him off, from the place where you stopped your car, and he got off and talked to the switch tender, how far was that?
A. Well, it might be about three blocks, two blocks, maybe three.
Q. Two blocks?
A. Yes, I didn't measure the distance, but it might be two blocks, along in there some place, a short distance, anyway.
Q. This semaphore that you speak of, you came in contact with immediately upon crossing the main line track, didn't you?
A. Yes.
Q. The same as is shown by this picture?

(Counsel hands picture to witness.)

A. Yes, sir.
Q. That is the semaphore you refer to, isn't it?
A. Yes.
Q. That is "Defendant's Exhibit D"?
A. Yes, sir.
Q. We will put a letter "A" on the semaphore. I have done that, haven't I?
A. Yes, sir.
Q. Now, you came around this way, didn't you?
185 A. Yes, sir.
Q. You had stopped down in this picture, some place down in this portion, hadn't you (indicating)?
A. Yes, sir.
Q. Well, we will mark that portion "B". You came from "B" around on this track, marked "BC"?
A. Yes.
Q. That is right?
A. Yes.
Q. That is the direction that you came, around from "B" around to "C"?

(Counsel indicates on photograph.)

A. Yes.
Q. There is a line of semaphores there, isn't there?
A. Yes, sir.
Q. Proceeding along, or built right along the track that you were coming along?
A. Yes, sir.
Q. They are all about the same distance from the track aren't they, from the rail?
A. Well, I could not say that.
Q. Well, as you observed them, they seemed about the same didn't they?

Mr. McSHANE: I object to that, wait a minute, wait a minute.
Mr. EVERETT: You need not wait, you need not wait unless the court says so.
The COURT: Objection sustained.
Mr. EVERETT: Exception.
To which ruling of the court, defendant, by its counsel,
186 then and there duly excepted.

Mr. EVERETT:

Q. From the point "B" to the semaphore marked "A", there was nothing to obstruct a view of one who looked in that direction, was there?
A. No, sir.
Q. One who was looking could see the semaphore?
A. Yes sir.
Q. You could see the semaphore from any point where you

stopped to get the switch, until you got up to the semaphore until you got on the inside?

A. No sir, you can't do it.

Q. Nothing to obstruct the view, is there?

A. Why, sure, you are going around a curve.

Q. But this semaphore is on the inside of the curve, isn't it?

A. Yes sir.

Q. Wagner was on the inside of the curve?

A. Yes sir.

Q. And you were on the inside of the curve?

A. Yes sir.

Q. There was no building or any other structure?

A. No sir.

Q. That would obstruct the view.

A. But look here, coming down off——

Q. Wait a minute. There was no building or any structure of any kind that would obstruct the view, was there?

A. No sir.

Q. It is all open country there and just railroad tracks all around, isn't it?

A. Yes, but you are going around a curve.

187 Q. You are going around a curve on the inside, are you?

A. Yes sir.

Q. Your train was going at the time that Wagner collided with this pole, about four miles an hour, wasn't it?

A. Well, between four and six, might have been going a little faster, I could not judge that speed, kind of down hill.

Q. Just about as fast as a man could walk while on a slow trot, isn't it?

A. Oh, a little bit faster than that.

Q. About as fast as a man could trot along?

A. Yes about that, between six and eight miles.

Q. Yes.

A. I could not judge the speed exactly.

Q. You had seen, during the time that you had worked with Wagner, you had seen him jumping off cars in motion?

A. Yes sir.

Q. He did it all right?

A. Yes sir.

Q. How far was this pole from the switch, that let you into the curved track?

A. Do you mean on the Western Indiana?

Q. Yes.

A. Well, I told you before about two blocks, I should judge, down to where that was.

Q. In what direction from the semiphore that knocked him off?

A. Well, I should think it was kind of east, going around the curve.

Q. Sort of southeast, was it?

A. Southeast, yes, I should judge that way.

Q. You come around the curve, didn't you?

A. Yes, sir.

188 Q. You come around a curve, didn't you, and cut diagonally across all these main lines?
A. Yes sir.
Q. You did not make any measurement to see how far the semiphore was to this car when it stopped, did you?
A. No sir, I did not.
Q. The car stopped within a car length and a half?
A. Yes sir.
Q. After you gave the signal?
A. Yes.
Q. You did not give the signal until the first car had gone by the semiphore, about one-half?
A. No sir, I did not.
Q. So that the train really stopped in about one car length after you gave the signal?
A. Well, about a car length and a half, I should judge.
Q. Well, you did not give the signal until half of the first car had gone by?
A. I did not give any signal until Wagner was hit by the post and I seen him fall.
Q. About the center of the first car? That was, half of the first car had gone by before you gave the signal?
A. Yes, about half.
Q. Then when the car came to a stop half of the second car was opposite the pole, wasn't it?
A. Yes sir.
Q. The door of the second car?
A. Yes sir.
Q. So that made the train stop in about a car length?

Mr. McSHANE: Wait a minute, I object. He assumes the engineer did not see it and started to stop before he gave the signal.
189 Mr. EVERETT: I am not assuming anything.
Mr. McSHANE: You are assuming how far the car ran.
The COURT: Objection sustained as to the question.
Mr. EVERETT: As to what?
The COURT: The objection will be sustained as to the question you asked.
Mr. EVERETT: Exception.
To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. EVERETT:

Q. Did you make any measurement at all?
A. No sir.
Q. What part of the pole struck Wagner?
A. What part?
Q. I mean what part of Wagner was struck by the pole?
A. Well I supposed he was crushed inwardly.
Q. What?
A. He went through the pole.
Q. He did not break the pole, did he?

A. Break it?
Q. Yes.
A. No, I guess not.
Q. Do you mean he went in between the pole and the car?
A. Yes, wasn't that enough. It broke him up pretty well, I guess.

Mr. EVERETT: I move to strike that out.
Mr. MCSHANE: Yes, I have no objection.
Mr. EVERETT: I move to strike out the statement of the witness.
The COURT: Yes, just answer the question. The answer will be stricken out.

Mr. EVERETT:

Q. You are interested in this case, aren't you?
190 A. Me?
Q. Yes.
A. No, only to tell the truth.
Q. You would like to see him win the case, wouldn't you?
A. No sir, I am only to tell the truth, that is all.
Q. Haven't you a personal desire that he win the case?
A. No sir.
Q. How far is the rail, the east rail, that is directly opposite the semiphore?
A. How far?
Q. How far is it from the semiphore?
A. I could not tell you, I never measured it.
Q. What is your best judgment?
A. Well, I suppose—you mean east?

Mr. MCSHANE: This is not cross examination, your Honor, and it is just a guess.

A. I would say about——

The COURT: Yes, the objection will be sustained, not being cross examination. I do not remember this man's testifying to that.
Mr. EVERETT: He testified as to the conditions there.
Mr. MCSHANE: Well, if there is any point to it——
Mr. EVERETT: I take an exception to the ruling.
To which ruling of the court the defendant by its counsel, then and there duly excepted.
Mr. MCSHANE: Go ahead, I withdraw the objection.
Mr. EVERETT: You cannot withdraw it, there has been a ruling.
Mr. MCSHANE: Well, he has answered.
Mr. EVERETT: He did not answer.
Mr. MCSHANE: What did he say, Mr. Reporter?
(Answer read.)
191 Mr. MCSHANE: I do not care if you want him to answer it, if you want him to guess at it I have no objection, I withdraw the objection.
Mr. EVERETT: What is the ruling of the court?
The COURT: Well, it is immaterial to the court. If he wants to stand on his objection, of course I will make a ruling, if he does not, I will not do so.

Mr. McSHANE: Well, I will withdraw the objection, if he wants to have the man's guess he may have it.

Mr. EVERETT:

Q. What is your best judgment of the distance?
A. From the east rail to the semiphore?
Q. From the east rail to the semiphore?
A. Well, I should judge about seven or eight feet, of course I never measured but that is just taking a guess at it.
Q. How far did the edge of this baggage car, the outside edge, extend over the east rail?
A. How far did it stand over, do you mean?
Q. Extend out, how far over was it?
A. Towards the semiphore?
Q. From the rail?
A. Well, I should judge——
Q. (continued). —from the semiphore?
A. It was very close, I could not exactly say, it could not have been over eight or ten inches in the middle of the car.
Q. So you think the semiphore was about seven feet away from the rail, and the car extended about six or eight inches?
A. No. You were talking about the east rail.
Q. Yes, the east rail of this track that you were on.
A. That is—why I would take that for the other side.
192 Do you mean the rail next to the semiphore?
Q. The east rail was the nearest rail to the semiphore?
A. Oh, I could not tell.
Mr. McSHANE: Not on that track?
Mr. EVERETT: The east rail of it the way you were going—it don't make any difference which way you were going.
Mr. McSHANE: The east rail of the track would be the width of the track away.
Mr. EVERETT: That is the east rail, you cannot change it, can you (indicating)?
The COURT: Proceed, let us get the testimony in.

Mr. EVERETT:

Q. I mean the east rail?
A. You mean the rail next to the semiphore?
Q. I mean the east rail?
A. How far was it away from the post?
Q. Yes.
A. Well, it might be three or four feet, might be a little more, I could not judge it. I thought you meant the other side.
Q. That semiphore is operated by the Western Indiana, isn't it?
Mr. McSHANE: I object to that, that is not proper.
The COURT: Objection sustained.
Mr. EVERETT: Exception.
To which ruling of the court the defendant by its counsel, then and there duly excepted.
Mr. EVERETT: That is all.

Redirect examination.

By Mr. McSHANE:

193 Q. You told Mr. Everett about how the man was hanging on the forward end of the car, did you see him at all?

A. Yes.

Mr. EVERETT: I object to that. He has been over it. He has covered it.

Mr. McSHANE: No, no.

The COURT: Well, he can tell it again.

Mr. EVERETT: Exception.

To which ruling, of the court the defendant, by its counsel, then and there duly excepted.

Mr. McSHANE: When this car was being backed around there, speaking of this switchman who was on the head end, did you see him at all?

A. No sir, I could not see Coleman, but I seen Wagner.

Q. I am speaking about Coleman. Do you know how Coleman was hanging on, or how he was not?

Mr. EVERETT: I object. The witness has answered the question. This is his own witness.

Mr. McSHANE: He probably guesses that.

Mr. EVERETT: I object to the statement of counsel and take exception to the remark.

To which remark of counsel for plaintiff, the defendant by its counsel, then and there duly excepted.

Mr. McSHANE: I would like to know how he knows it if he did not see him.

The COURT: He may answer.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

194 A. Well, I will tell you how I know that, Mr. McShane.

Mr. McSHANE: Yes.

A. When we pulled back over the switch I stood there.

Q. Yes.

A. He had the gun. What we call the gun is the air hose.

Q. I see.

A. We had air all the way through. When we pulled back, we went back about half a car length, and threw the switch, and he was standing with him arm through this brake wheel.

Q. Then you saw him before you started?

A. I saw him before I started.

Q. That is all right.

Mr. McSHANE (addressing Mr. Everett): Let me have the blue print and the statement that he refreshed his memory with about the number.

Mr. EVERETT: I have not offered it.

Mr. McSHANE: Well, you have refreshed his recollection. He said he did not know the number.

Mr. EVERETT: Oh, here it is.

(Counsel hands paper to Mr. McShane.)

A. Well, I forget the number, it is so long ago.

Mr. McSHANE: Just a minute.

Q. This statement that you made——

Mr. EVERETT: Here is the number (indicating).

Mr. McSHANE:

Q. This statement that you refreshed your recollection from is one that you made to the Burlington?

A. Yes sir.

Q. C. B. & Q.?

A. Yes sir.

Q. Is this your writing?

A. Yes sir.

Mr. EVERETT: I forget to have that statement marked, will you mark it or have it marked?

Mr. McSHANE: Yes, I have no objection.

195 (Said statement was thereupon marked Defendant's Exhibit G for identification.)

Mr. McSHANE:

Q. Why, Mr. Connell, weren't they Great Northern cars and not Northern Pacific?

A. Yes, they were Great Northern.

Q. Well, he has got it here N. P., that would stand for Northern Pacific, wouldn't it?

A. Yes, I got that in there wrong.

Q. Yes, they were Great Northern cars?

A. Yes.

Q. Not Northern Pacific?

A. Yes, that is right, I made a mistake on that; that is right.

Q. Do you remember the number of the particular car that he was on, Mr. Connell?

A. No sir, I could not just say that, I cannot recollect that.

Q. Your statement here has got a number on it; whether that was the car or not you don't know, do you?

Mr. EVERETT: I object to the form of the question.

Mr. McSHANE: Well, it was one of the cars in the train—I do not think it is important at all or not, I want to know if he remembers the number.

Mr. EVERETT: It may be important.

A. No, I do not remember the number.

Mr. McSHANE:

Q. Do you know of your own knowledge that that blue print is a correct representation of either of these cars, or are you just guessing at it?

A. No sir, it is not.

Q. It is not what?

A. Not the cars that we had exactly, the cars that we had, the doors were about 15 feet from each end on those cars.

196 The COURT: Talk a little louder so that the men clear across can hear you.

A. About fifteen feet from each end of the car.

Mr. McSHANE:

Q. Then this blue print here that he has been questioning you about, to your mind does not show——

A. No sir.

Mr. EVERETT: I object, he never said that it did. He stated on my examination that it did not.

Mr. McSHANE: I thought he did. He was talking about the handle.

The COURT: Overruled.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. McSHANE:

Q. What brake handle was that he was questioning you about that Coleman held?

A. Why this brake handle right here, right here (indicating).

Q. You see this car he shows you has a door in the end of it?

A. Yes sir.

Q. I suppose the car in question did have doors too?

A. Yes.

Q. But not the platform?

A. No sir.

Q. Are the brakes something like that?

A. Something like that, yes sir.

Q. Whether it was exactly like that, do you know?

A. No, I could not say that.

Mr. EVERETT: I object to the question.

The COURT: Overruled.

197 Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. McSHANE:

Q. Where is the stirrup that you speak of on the end of the car?

A. Why the stirrup would be around here (indicating).

Q. In here?

A. On this end.

Q. Yes, any stirrup there?
A. Yes, there is.
Q. In that diagram can you point out the stirrup?
A. No, I cannot.
Q. I didn't see any. That is the reason I wanted to know.
A. No, I cannot do it there.
Q. But you think there was a stirrup on the end of the car?
A. There might have been, yes.
Q. I don't want to know what there might have been.
A. I am not certain about that.
Q. Now this man with the air gun, as you call it,—wasn't there one of those grab irons?

Mr. EVERETT: I object.
The COURT: Objection sustained.

Mr. MCSHANE:

Q. Well, do you know, do you know what it was, whether grab iron or stirrup?

Mr. EVERETT: I object to that question.
Mr. MCSHANE: I want to know whether he was.
Mr. EVERETT: The witness has stated positively that there was a stirrup on the end.
Mr. MCSHANE: No, he did not.
198 Mr. EVERETT: We all heard what he said, I did and so did the jury.
Mr. MCSHANE: You sort of——
Mr. EVERETT: No, I did not "sort of anything," you are "sort of" now.

Mr. MCSHANE:

Q. Now what is your best recollection, Mr. Connell? I don't think it makes any difference one way or the other.

Mr. EVERETT: All right.

Mr. MCSHANE:

Q. Do you know whether there was a stirrup or grab iron on the end?

Mr. EVERETT: I object to it. Counsel says it doesn't make any difference one way or the other.
Mr. MCSHANE: I say without reference to whether it is or not, I do not know that it is. Do you know whether there was a stirrup or grab iron?
Mr. EVERETT: I object. I think that the witness has already answered that there was a step on that end.
The COURT: Well, he may answer the question.
Mr. MCSHANE: It was new matter he brought out.
The COURT: Go ahead.

Mr. MCSHANE:

Q. Do you remember?

The COURT: He may answer.

Mr. McSHANE:

Q. Do you?
A. Well, as a rule, I would not be positive, but as a general rule they have a stirrup there, or something, kind of a hand hold to get on to the cars, but I would not be positive about that car, so long ago.

Mr. McSHANE:

Q. Something to get on with, is that something not usually a grab iron?

Mr. EVERETT: I object to that question as to the form.
199 The COURT: He don't know about this car.
Mr. McSHANE: No, he don't know.
Mr. EVERETT: Objection sustained.

Mr. McSHANE:

Q. Where was it, as you carry it in your mind, whatever there was there, where was it, do you think, above the body of the car or on the under sill, or where?

Mr. EVERETT: I object to the question as to the form.
The COURT: Objection sustained.

Mr. McSHANE:

Q. This air gun that you speak of is the whistle?
A. Yes sir.
Q. The man has a little hose there with a cock, and he can either shut the brakes or blow a whistle, can he?
A. I could not say whether this was a whistle gun or not. Sometimes there is whistle guns and sometimes not, but he has got air pressure to stop the train.
Q. He holds that so when he shuts that and shuts off the air, and the train stops?
A. Yes sir.
Q. The cars are coupled up with air?
A. Yes sir.
Q. That is what he was there for?
A. Yes sir.
Q. He looked ahead?
A. Yes sir.
Q. He could not see you and you could not see him?
A. No sir.

Mr. EVERETT: I object to that.
The COURT: Objection sustained, don't let us go over that again.
Mr. McSHANE: Now—
Mr. EVERETT: I move that be stricken out.
The COURT: Strike it out.
Mr. McSHANE: That is all.

200 Recross-examination.

By Mr. EVERETT:

Q. This front end of this car as it proceeded had a door at the end, did it?
A. Yes sir, as far as I remember.
Q. And that door stood back the same as the side doors, didn't it?
A. On the end of the car.
Q. Yes.
A. Yes sir.
Q. Set back probably six or eight inches, didn't it?
A. Yes.
Q. That was in addition to the platform that you spoke of, that was about eight or ten inches?
A. Well, I could not say, I think those doors set back that far, of course I never measured them.
Q. Well, the door set back, as far as it did set back, in addition to the platform?
A. Yes sir.
Q. So that from the edge of the door out to the outer edge of the platform, there was about a foot wasn't there, on the end of the car?
A. Yes, if a man was standing right up against the door.
Q. Yes, he would have about a foot.
A. But the gun, to use that gun, he could not do that.

Mr. EVERETT: I move to strike out about the man using the gun, that is not responsive, I asked him——
The COURT: Strike it out.
Mr. EVERETT: That is all.

201 Redirect examination.

By Mr. MCSHANE:

Q. Could a man using an air gun stand in there?

Mr. EVERETT: I object.
The COURT: Objection sustained.

Mr. MCSHANE:

Q. If a man stood in the door, could he give a signal to anybody?

Mr. EVERETT: I object to that.
The COURT: The objection will be sustained, that is for the jury to determine.
Mr. MCSHANE: Exception.
To which ruling of the court the plaintiff by his counsel, then and there duly excepted.

Mr. MCSHANE:

Q. Was there a door on either side of the vestibule?
A. Yes sir.

Q. That is, you mean, that if this was the door (indicating) there is a vestibule on either side sticking out that way (indicating)?
A. Yes sir.
Q. Standing in there that way?
A. Yes sir.

Mr. McSHANE: That is all.
Mr. EVERETT: That is all.

(Witness excused.)

HOLLIS E. POTTER, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. McShane, and testified as follows:

202 Q. What is your name?
A. Hollis E. Potter.
Q. Your profession?
A. I spend my time working with X-Rays.
Q. Well, you are a graduate?
A. I am a graduate physician, licensed in the State of Illinois.
Q. Of what year, doctor, were you a licensed physician?
A. In 1908.
Q. Of late years you have made a specialty of X-Rays, haven't you?
A. I have done X-Ray work every day for five or six years.
Q. In a general way about how many X-Ray pictures have you taken?
A. About thirty five thousand.
Q. Twenty-five thousand?
A. About thirty-five thousand.
Q. Thirty-five thousand?
A. Yes.
Q. What have you taken them for?

Mr. EVERETT: I object to that.
Mr. McSHANE: That is a question of qualification.
The COURT: He may answer.
Mr. EVERETT: Exception.
To which ruling of the court the defendant, by *his* counsel, then and there duly excepted.

A. The majority or large part of the work is in making X-Ray skiagraphs of fractured bones, and the rest of the work is distributed over a large number of diseases, in medicine.
Q. From your experience, doctor, with pictures and anatomy, and all that, are you able to tell whether your pictures are correct, or not?
203 A. Yes sir.
Q. Did you take a skiagraph or X-Ray of the plaintiff?
A. Yes sir.
Q. What do you call it, a skiagraph or an X-Ray, which is correct?

A. Why there are many names for that. Skiagraph is as good as any that I know of.

Q. When you took the picture of Mr. Wagner you took one for Mr. Griffen, didn't you, at his request?

A. Yes sir.

Q. When did you take it?

A. I made this skiagraph about ten days ago.

Q. Have you the picture with you?

A. Yes sir.

Q. Let us see it, doctor?

(Witness produces X-Ray plate and hands same to counsel.)

Q. Is that a plate or a picture?

A. A plate.

Q. Now, will you explain to the jury——

Mr. EVERETT: Mr. McShane, can't you have a print made from that so that the jury can understand that better.

Mr. MCSHANE:

Q. Just explain that skiagraph to the jury, the bones, where they are, their position, and all about it?

A. Well, this is the plate which lay under the man, with the light shown down through his body, through his pelvic region, and the impression which the light made upon the plate has been developed into this form. It is best seen by looking through with the dull side away from you, in which the position the left side of the patient is on your right. Holding it that way looking through it, it is seen that the pubis bone, that is the front
204 part of the pelvis is shown at the bottom of the plate here, the left pubis is seen to be about three-quarters of an inch higher than the right pubis; and at the bottom of the pelvis, which corresponds with this position (indicating) on the left side of the patient, which is the right side of the plate as held in this position, the left pelvic bone, with relation to the sacrum is about three-quarters of an inch higher, that is towards the head.

Q. You mean higher than normal.

A. Higher than the other side, higher than normal, yes.

Q. Go ahead.

A. The inference from that, on carefully looking at both of those places named, is that the pubis in front has been separated. There is normally a joint at that point filled in with cartilage, and the upper part of the pubis bone——

Mr. EVERETT: I object to this witness testifying to anything except a description of this picture.

Mr. MCSHANE: Well, he is describing that.

Mr. EVERETT: Now he has gone beyond that.

Mr. MCSHANE: Well, he is describing that, he is telling what it shows.

The COURT: What portion do you object to. If you will tell me what portion you object to I will rule on it.

Mr. EVERETT: I move to strike out that part of the reply wherein he stated that the pubis bone, or the two front bones on the pelvis—had a joint, did you say?

A. Yes, I said that.

Mr. EVERETT:

Q. (Continued.) In a normal man?

Mr. MCSHANE:

Q. Do you know whether——

Mr. EVERETT: No, just a minute.

205 Mr. MCSHANE:

Q. I want to know whether——

Mr. EVERETT: I want to know whether he is an expert on this.

Mr. MCSHANE: He has testified he knows.

The COURT: Strike it out for the present. You may qualify him further if you care to.

Mr. MCSHANE:

Q. Do you know whether in a normal man there is a joint at that point, in the normal man?

A. In the normal man, in the normal pelvis there is a joint between the right and left hand side of the pelvis, one in front, between the right and left hand of the pelvis, and that is called the symphysis-pubis.

Q. Doctor, the point is, are you qualified—do you know as a physician from other experience that there is a joint in a normal man at that place?

A. Yes sir.

Q. What is the fact as to whether there is in this man or not, as to whether there is or not in this man?

A. The joint is shown here (indicating), but not as a normal joint.

Q. Well, in what way is it not normal?

A. In the normal person the joint is—well, the bones which form the joint are equal in height.

Q. Yes.

A. In this case the left hand of the pelvis, the left side of the pelvis is about three-quarters of an inch higher than the right side of the pelvis, showing a dislocation.

Q. At that point where you spoke of where one was three-quarters of an inch above the other, in the normal man are they on a level?

206 A. The right half is similar to the left half, yes sir, in a normal man.

Q. So it means what about this man's pelvis?

A. It means simply that the left side of the pelvis had been racked upward, towards the head three-quarters of an inch or thereabouts.

Q. Broken in front and behind and raised up?
A. Yes sir.
Q. What is the pelvis, doctor?
A. The pelvis is the portion of the boney skeleton which acts as the go-between the spine and the leg. It attaches with the lower end of the spine, and it attaches with the hip bone, the femurs. It is formed of two very large bones irregular in shape. At the forward side, the forward and lower side they unite to form the symphysis-pubis, at the back side they unite with the lower segment of the bone called the sacrum.
Q. That is a fracture of both the front and back, is that right?
A. I should say that it is a separation of the point in front.
Q. Yes.
A. A separation of joints are usually called dislocations. I should say it was dislocations. I should say that it was a dislocation more of the front of the pelvis, and in the back it is a fracture and dislocation.
Q. Breaking of the bone.
A. It is a breaking of the sacrum bone at or near the joint.
Q. What is the union, if any, in the present faulty position, is there union?
A. There seems to be a slight filling up of the space
207 with bone in front, causing more or less boney union between the pubis, right and left, at the back there is a considerable amount of callus thrown out around the fractured sacrum.
Q. So that in this faulty position it is anchored there in a way?
A. Yes sir.
Q. Not a good union, but——

Mr. EVERETT: I object to the argument.
Mr. MCSHANE: All right.
The COURT: Objection sustained.
Mr. MCSHANE: That is all, doctor.

Mr. EVERETT:

Q. Are you licensed?

Mr. MCSHANE: I offer—excuse me—I offer this plate in evidence.
Mr. EVERETT: I object to it and I request that you have a print made of it. We can't put that plate into the record.
Mr. MCSHANE: The plate is the best evidence; the print is only secondary evidence.
The COURT: You can cross examine as to whether it ought to be admitted or not.
Mr. MCSHANE: All right.
The COURT: Proceed.

Cross-examination.

By Mr. EVERETT:

Q. Are you licensed to practice as a physician in the State of Illinois?

A. I am.

208 Q. What school did you graduate from?

A. Rush Medical College.

Q. When?

A. 1908.

Q. 1908?

A. Yes sir.

Q. You have been taking X-Ray pictures for five years?

A. Yes sir.

Q. You took X-Ray pictures before you were a physician?

A. I had charge of the X-ray work in the Cook County Hospital and the Presbyterian Hospital two years.

Q. Now, I did not ask you that. I said you took X-ray pictures before you were admitted to practice in the state of Illinois, didn't you?

A. Yes, sir.

Q. In taking an X-ray picture, you lay your patient out flat, don't you?

A. There are many positions in which they are placed.

Q. But this picture, in taking this particular picture, you lay the patient out flat?

A. Yes.

Q. On his back?

A. The patient on his back, yes, sir.

Q. You have a slanting light in a bulb, haven't you, on a diagonal as it strikes him?

A. This was made with the light directly above the man.

Q. At right angles with the man?

A. Yes, sir.

Q. Let me see the plate a minute, will you please?

(Plate handed counsel.)

209 Q. How far was your light from the body of your patient?

A. 12 inches.

Q. 12 inches?

A. Yes, sir.

Q. How far was the body from the plate?

A. The posterior portion of the body was directly on the plate.

Q. Resting on the plate?

A. Well, on a paper that was on top of the plate, yes, sir, a sheet of paper, either be two or three sheets.

Q. The distance between the plate and the body has a great deal to do with the correctness of the picture, hasn't it?

A. Yes, sir.

Q. Moving the plate a slight part of an inch will magnify the lines, won't it, make them duller?

A. Magnify the lines very much smaller part than that fraction of an inch.

Q. Doesn't it make it more blurry, don't the lines get larger as you take the plate further away from the body?

A. Yes, if you will make that modification.

Q. Isn't that true?
A. Yes, that is true, that is the rule.
Q. So that moving the plate from under the body of this man a very little bit will tend to magnify the lines in there, tend to make them larger, that is the fact, isn't it?
A. No, it won't tend to make them so that you can notice it, it is only moved a little bit.
Q. And not notice it?
A. No, sir.

210 Q. You take that hole in that paper and put it under that light, doesn't that hole grow larger as shown on that picture? (Counsel illustrates.)
A. It tends to grow larger, yes.
Q. Isn't that the same system that is followed in taking this picture, don't you have the light in the same position?
A. No, sir, we have the light considerably farther away, so the relation is very much different.
Q. It is above the object?
A. Yes, sir.
Q. The plate is below it?
A. When you get——
Q. The plate is below it?
A. The plate is below it.

Mr. McSHANE: Don't interrupt him every time he is answering, and break in.

Mr. EVERETT:

Q. And the slightest movement of that plate from the object you are taking, tends to enlarge the lines, that is the fact, isn't it?
A. What do you mean by tend to enlarge?
Q. It does enlarge them?
A. The slightest movement——
Q. Shows them larger——

Mr. McSHANE: When you ask a question, let him answer it.
Mr. EVERETT: He asked me. Why don't you answer the question?
Mr. McSHANE: You must not break in.
Mr. EVERETT: Why don't you let him answer the question? You are making interruptions.
Mr. McSHANE: Let him answer. Answer the question.

A. I answer it this way, the slightest movement you make
211 does not produce appreciable largeness, no, sir.
Mr. EVERETT: You are talking about a hair's breath movement.
A. I thought you were.
Q. Well, you were.
A. Yes, sir, I am talking about the same movement.
Q. Well, if you move a quarter of an inch, it does make a difference, doesn't it?
A. If you measure it, I presume you could notice it.

Q. Yes, it does.
A. But you could not notice it by the eye, I presume.
Q. You don't claim to be an expert on anatomy of the body, do you?
A. I have studied anatomy about as much as most people do that graduate from medicine, and a little bit more, yes, sir.
Q. You would not attempt to describe the nerves that enter the pelvis, by name, would you, or their route?
A. That enter the pelvis?
Q. Or the pelvic region?
A. From what point?
Q. Well, from the point of the spinal cord?
A. From the——
Q. Above the pelvic region.
A. From above?
Q. Yes.
A. On the inside of the pelvis?
Q. Yes.
A. The sacral plexus.
Q. The sacral plexus?
A. The lumbar plexus.
Q. The sacral plexus runs down to the leg, doesn't it?
A. Yes.
Q. How many nerves are there in the sacral plexus?
A. I think there are six.
Q. Do you know the names of them?
A. One, two, three, four, five——
212 Q. You give them numbers, do you?
A. That is the way they are named, by number.
Q. Do you know their function?
A. They supply the cutaneous region around the foot, and up on the inner side, to the knee of the leg.
Q. Don't they supply above the knee?
A. And up to the rectum, a small patch inside of the thigh, practically covering the region which a man would touch when he is riding on a saddle.
Q. Doctor, you said that you were judging the condition of these bones from a normal man. You never have seen a normal man, have you?
A. The definition——
Q. Have you ever seen a normal man?
A. Yes, sir.
Q. Who was it?
A. The normal man is the average man, the average——
Q. Why, isn't a normal man a man that is perfect?
A. The normal man is the average man, the average man in good health.
Q. Isn't the definition of a normal man, a man that is perfect?
A. No, sir.
Q. Isn't that the medical definition?

A. A normal man is the average of all men that are in good health.

Q. That is your definition of a normal man?

A. That is what I have been taught is normal, yes.

Q. Who taught you that?

A. I learned that in Rush Medical College.

Q. The position of the patient, when you are taking an
213 X-ray, if it happens to be tipped, or is not absolutely on the level, will change the X-ray photograph, won't it?

A. Change somewhat the relation of the different portions.

Q. It will magnify the bone that is nearer to the light, it will magnify that bone more than it would the other, would it not?

A. Yes, the farther away from the light the object is, the more it is magnified, the farther away from the plate and nearer the light the more it is magnified.

Q. In other words, if the patient were tipped a little bit on one side, it would not be a correct picture of the condition of his pelvis, would it?

A. It would throw a shadow in different relation, yes, sir.

Q. It would make one side more prominent than the other in the picture?

A. Oh, it would throw one part, the anterior part to the side of the posterior parts, yes, sir.

Q. One side would appear more clearly than the other, wouldn't it, on the picture, the lines more defined?

A. Probably if the light were tipped enough, it would change the definition.

Q. If the body was tipped, the body of the patient was tipped?

A. Yes, sir.

Q. That would have the same result, would it not?

A. What?

Q. If the body was tipped, the body of your patient was tipped——

A. Yes sir.

Q. That would have the same result?

A. Yes sir.

214 Q. If the plate itself was tipped it would have the same result?

A. Practically, yes.

Mr. EVERETT: That is all.

Redirect examination.

By Mr. MCSHANE:

Q. Doctor, you spoke about the County Hospital, what was your hospital connection?

A. I was head of the Radiograph Department in the County Hospital.

Q. For how long?

A. For three years.

Q. In these pictures that you have taken, do you take them for other doctors or for whom?

A. They were referred to the X-Ray Department by all the Wards in the hospital.
Q. I mean, just generally in your practice?
A. Yes sir, they are made in consultation with other doctors..
Q. In assisting in a diagnosis?
A. Yes sir.
Q. That is your regular work?
A. Yes sir.
Q. Were the pictures taken to show the true situation of this plaintiff here in this case, or did you try to do some slight-of-hand work on it?
A. The plate itself shows that the light was directly above the body, because the anterior portion, the middle of the anterior portion coincides with the middle of the posterior portion of the body.
Q. So that——
A. It shows itself that it was made exactly right.
215 Q. It was made right, was it?
A. It was made right yes.

Mr. EVERETT: I object to that.

Mr. MCSHANE:

Q. Well, was it made right?

Mr. EVERETT: I object to that question, it has been answered.
The COURT: Objection sustained.

Mr. MCSHANE:

Q. Was the form of the bone magnified here in any of the ways that he speaks of that might be possible?
A. The front bone appears—the width of the front bone is larger than the bone itself, certainly. It lies about six inches away from the plate so its shadow must be broader than the shadow of the real bone.
Q. Does the offset show the same truly as it is?
A. It is uniformly magnified, yes sir.
Q. So that the magnifying quality is uniform, the magnifying is uniform?
A. The relations are practically the same.

Mr. MCSHANE: Now I offer that in evidence, your Honor.
Mr. EVERETT: Just a minute.

Recross-examination.

By Mr. EVERETT:

Q. This picture then is larger than the—and the bones shown here are larger than the subject, than in the man himself?
A. They are slightly larger, yes sir.
Q. Because of the difference between the plate and the body, because of the difference of the distance between the plate and the body?
A. Because we could not have the bare bones to put right
216 on the plate.

Mr. EVERETT: Yes, that is all. No objection to the introduction of it.

Mr. MCSHANE: It is marked——

Mr. EVERETT: I think you had better get a print made of it. It can be handled in the record better, and the jury can see more of it than they can through this plate.

Mr. MCSHANE: If you want to order one you may. The doctor will probably take your order.

Q. Will you?

The WITNESS: I can have it made.

Q. Somebody else finishes them?

A. Yes, I never make any prints.

Mr. EVERETT: You develop the plates yourself, don't you?

The WITNESS: Yes.

Mr. MCSHANE: Well, the plate is all that is necessary, as far as we are concerned. If it is necessary to have a record made up we can have a print made.

Mr. EVERETT: You agree to furnish a plate for the making of a print if we have to have one made?

Mr. MCSHANE: Sure.

Mr. EVERETT: For either side.

Mr. MCSHANE: Yes, sure.

Mr. EVERETT: That is all.

Mr. MCSHANE: Do I understand the plate goes in, your Honor?

(Which said X-ray plate was admitted in evidence and by agreement of the parties a print of the same is attached to the next page hereof in lieu of said plate.)

(Here follows photograph marked page 217.)

218 The COURT: Yes.

The COURT: Gentlemen of the jury, you will observe the instructions heretofore given you by the court. Be in your places promptly at two o'clock. We will take a recess until that time.

Whereupon an adjournment was taken until 2 o'clock same day.

TUESDAY, May 16, 1911—2 o'clock p. m.

Court met pursuant to adjournment.

Present same as before.

FRANK COLEMAN, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. McShane, and testified as follows:

Q. What is your name?

A. Frank Coleman.

Q. How old are you?

A. 28 years old.

Q. You are a switchman for the C. B. & Q.?

A. Yes.

Q. You are one of the men that was on this car with Wagner the day he was hurt?

A. Yes.

Q. As these cars were going around that track on which he was hurt, where were you in that train?

A. I was on the fifth car, the same car he was on, only I was on the back end of the train there and he was on the side of the car.

Q. You were on the forward end, the way the car was

219 going?

A. Yes.

Q. And he was on the end of the car?

A. The way I got on the car myself, I had to get on the brake beam and then put my arm through the brake wheel, and I stood on the hand hold; there was no platform to stand on.

Q. What hand hold do you mean?

A. There is a hand hold for you to hang on to.

Q. A grab iron?

A. A grab iron. I stood on there, and I had my arm through the brake wheel, so I wouldn't fall off the car.

Mr. EVERETT: I move to strike out of the answer "So I wouldn't fall off of the car."

The COURT: It will be stricken.

Mr. MCSHANE:

Q. Was there anything there in the way of hand holds or stirrups, except that?

A. I didn't notice.

Q. Where was that with reference to the body of the car; on the sill of the car?

A. Yes, sir, on the sill.

Mr. EVERETT: I object to the form of the question.

Mr. McSHANE:

Q. How did it run, in which direction?
A. It ran east and west.
Q. Crosswise of the car?
A. Yes, sir, crosswise.
Q. And what were you doing there?
A. Well, I was supposed to protect that end of the train shoving down there, in case they wanted to stop. I was with the air gun.
Q. Where was the air gun, so-called?
A. It was connected with the air hose, and the hook of it was hooked to the brake wheel.
220 Q. Connected with the air hose, and hooked on to the wheel?
A. Yes.
Q. And it had a little valve there?
A. Yes, in case you wanted to use the air.
Q. Which arm did you hang on with?
A. The right arm.
Q. And what did you have hold of the valves with, the air pump?
A. My left hand.
Q. Which side of the draw bar were you on, on the inside of the curve or the outside?
A. I was outside of the curve, I think.
Q. Were you on the side that Wagner was on, or the other side?
A. The side Wagner was on.
Q. The side Wagner was on?
A. Yes.
Q. Where were you riding with reference to the rail, were you on the inside of the rail or outside?
A. I think I was just about inside of one of the rails.
Q. Could you see the engineer from where you were?
A. No, sir.
Q. And which way were you facing?
A. I was facing northeast, the way we were shoving.
Q. The direction the cars were going?
A. Yes.
Q. How fast do you think they were going when they started, just before they started to stop at the time of the accident?
A. I should judge seven or eight miles an hour; I guess something like that.
Q. Did you notice this post at all, this semaphore post?
221 A. Yes, sir, I noticed it.
Q. Did you notice the other semaphore posts as you came along there?
A. That is the only one I passed, I think.
Q. You didn't notice any others?
A. No.
Q. What is the first you learned that anything had happened?
A. When the engineer had stopped the train, that is the first I knew about it.
Q. You didn't see Wagner get hurt?

A. No, I didn't see him; no, I wasn't an eye witness to him getting hurt.
Q. What did you do when the train stopped?
A. I got off and went to where he was lying.
Q. Where was he with reference to the semaphore post?
A. He was lying north of the post.
Q. And how close to it?
A. About three feet, I guess.
Q. When you got around there, did you observe how close—what car was at the post when you got around there?
A. I think it was the second or third car from where I was; the second car I believe it was.
Q. The train was standing there, was it?
A. Yes.
Q. How much clearance was there between the post and the side of the car that stood alongside of him?
A. I should judge about three or four inches.
Q. And what did you do with Wagner?
A. We picked him up and took him over to the switch tender's shanty over there.
Q. And how did you take him over there?
222 A. They carried him over there.
Q. What did your crew do?
A. We went on with the silk, and took the silk over to the Erie.
Q. Where did you get those cars?
A. We got them at the Harrison street yards.
Q. At the depot?
A. No, sir, the Harrison street freight house.
Q. And delivered them to the Erie Railroad?
A. Yes, sir, on 51st street.
Q. Were you there when the cars were opened?
A. No, sir.
Q. You were not there?
A. No, sir.

Mr. McSHANE: I guess that is all.

Cross-examination.

Mr. EVERETT:

Q. How long have you been switching?
A. How long?
Q. Yes.
A. About eight years.
Q. How long had you known Wagner?
A. I knew Wagner about four years, I guess, five years.
Q. How long did you work with him as one of his crew?
A. Well, I worked with him, I guess, three or four weeks; but I had worked with him before that.
Q. He was your conductor at that time?
A. He was a conductor at that time.

Q. He was the conductor in charge of this train at the time of the accident, was he?
A. Yes, sir.
Q. He gave you your orders and directions, and he had the management of the train?
223 A. Well, he told me he was going over the shortest road; he got orders to go the short way.
Q. There were two connections with the Erie, wasn't there?
A. Yes.
Q. One with the air line at 16th street?
A. Yes, sir.
Q. How far was that from this Grove street track?
A. I should judge three blocks.
Q. To the south of it?
A. Yes.
Q. You had to go by the air line to get to the Grove street track, didn't you?
A. Yes, sir.
Q. And the connection you wanted to make could have been made by going over the air line, couldn't it?
A. Could have been made that way, yes, sir.
Q. And Wagner told you he was going to take the Grove street connection?
A. The shortest way, he told me.
Q. That meant the Grove street connection?
A. Yes, sir.
Q. Where had your train started from that day?
A. The Harrison street freight house.
Q. Hadn't you been some place before that?
A. We had come from Western Avenue with a light engine.
Q. What had your crew been doing at Western Avenue before the accident?
A. All I remember is, we just got the engine there.
Q. What time did you come to work that morning?
A. At seven o'clock.
Q. Did Wagner get there the same time?
224 A. Yes, sir.
Mr. McSHANE: What time did he say?
Mr. EVERETT: Seven o'clock.
Q. You did some switching around the Western Avenue yards, did you not?
A. I don't remember doing any switching there. If I am not mistaken we got the engine about an hour or two before seven, but our time started at seven.
Q. This train was the first you took out?
A. Yes.
Q. Your crew merely worked around the City of Chicago in the various yards?
A. Yes.
Q. And had done that for a long time prior to the day of this accident?

A. Yes, sir.
Q. You didn't go outside of the State of Illinois at all?
A. No.
Q. The movements you were making of these cars was merely from the Harrison street yard to the Erie yard?
A. From the Harrison street yard to the Erie yards, yes, sir.
Q. At 51st street?
A. Yes, sir, at 51st street.
Q. A matter of three or four miles?
A. Yes, sir.
Q. And the day was light?
A. Yes, sir.
Q. The sun was shining?
A. Yes, sir, it was shining.
Q. Over what tracks did you go after you left the Harrison street yard?
A. We used the Pennsylvania tracks.
Q. And proceeded northwest?
225 A. Proceeded north to Archer Avenue, and crossed over to the north-bound main track, and there was a semaphore there, and we waited for the arm before we could go to Grove street.
Q. Who signalled for the semaphore; who notified the semaphore man you wanted to go on the Grove street track?
A. We got the switch tender, who called the tower man, to say where the cars were going.
Q. And the signal is then passed to you?
A. And he gave us the semaphore; the bottom arm, I believe it is.
Q. You got the signal of the first semaphore man, you mean, after leaving your yard?
A. Yes.
Q. And he passed the signal along to the other man in charge of the semaphore; that is right, is it?
A. Yes.
Q. Don't shake your head, the reporters can't get it. You answered yes?
A. Yes.
Q. So that when you came to the semaphore which controlled the Grove street switch, it was only necessary for you to stop the train and wait for the signal?
A. For the board.
Q. And came to a stop before getting on the track?
A. Yes.
Q. How close to the track did you stop?
A. What?
Q. How close to the swtich did you stop?
A. We stopped right in front of the board.
Q. How far was that from the semaphore pole that Wagner was hurt on?
A. I don't know how far, 100 feet; not quite that; this
226 semaphore we are talking about now is on the Pennsylvania Company, where we stopped before we went on.

Mr. McSHANE:

Q. What is that?

A. This semaphore that we are talking about now is on the Pennsylvania Company, where we stopped before we went on.

Mr. McSHANE: I move to strike that out.

Mr. EVERETT: I object to it being stricken out.

Mr. McSHANE: He don't know anything about that.

Mr. EVERETT: I object to counsel making any remarks. I have the witness at the present time.

The COURT: Do you object?

Mr. EVERETT: Yes, I am objecting to the remarks of counsel.

Mr. McSHANE: Are you speaking of the semaphore——

The WITNESS: A- no, this is——

Mr. EVERETT: I object to counsel taking up the examination at this time.

The COURT: There is nothing in front of the court, and no objection has been made.

Mr. McSHANE:

Q. I don't care about some other semaphore——

The WITNESS: This semaphore that we are talking about——

Mr. EVERETT: Wait a minute, there is no question.

Mr. McSHANE: I am asking him what he is talking about.

The COURT: Yes.

Mr. EVERETT:

Q. As you proceeded along on the Pennsylvania line, there were semaphores close to the track all the way along, were there not?

A. Yes.

Q. How close were those semaphores to the track you were going on?

227 A. I don't know just exactly how close they were.

Q. About?

A. About four or five feet, I guess.

Q. As you approached with these cars on that track, you came out of this brdige shown on Defendant's Exhibit C, did you not?

A. Yes.

Q. There is a semaphore under the figure marked 1, is there not, that you passed immediately after coming out of the bridge?

—. ——.

Q. You went by that one?

A. Yes.

Q. You were on the track nearest to the semaphore as you came along there?

A. Yes, sir.

Q. When you stopped your train just before getting on to this Grove street track, you could see the Grove street track ahead of you, couldn't you?

A. Yes, sir.

Q. You could see the semaphore?
A. Yes.
Q. The semaphore that struck the plaintiff in this case?
A. Yes.
Q. You could see its location?
A. Yes, sir.
Q. You could see it any place and any time; you could see it from any place and any time from the time you stopped for the semaphore signal to let you go in on the Grove street track?
A. Yes, sir.
Q. There was nothing from that point, to the point of the semaphore that struck him, that obstructed the view of the semaphore, was there?
A. Not that I know of, no.
228 Q. That was a distance of three or four hundred feet, wasn't it?
A. I don't know just exactly.
Q. Well, about that?
A. Yes.
Q. And any one looking at that could have seen it?

Mr. McSHANE: I object to that, your Honor.
The COURT: Objection sustained.
Mr. EVERETT: Exception.
To which ruling of the court the defendant by its counsel, then and there duly excepted.

Q. During all of that time, there was nothing in the nature of a structure of any kind that obstructed the view, was there?
A. No.
Q. The semaphore was on the inside of the curve?
A. Yes.
Q. Wagner was riding on the inside of the curve?
A. Yes, sir.
Q. You were standing on the half of your car that was on the inside of the curve?
A. Yes, sir.
Q. Your foot rested on the stub end, didn't it, of the car?
A. On the grab iron.
Q. I show you a drawing marked Defendant's Exhibit E and call your attention to that part of the drawing at the left hand upper corner which purports to be the end of the car; does that look like the end of the car that you were riding on?
A. There was a brake wheel on it, but no stirrup here (indicating).
229 Q. Does it look like it?

(Showing witness photograph.)

A. There was no door on the end at all. A blind door; no place to hang on the door at all.

Mr. EVERETT: I move that "no place to hang on the door at all" be stricken out.

Mr. McSHANE: "No door" answers it.

Mr. EVERETT: I ask to have the answer stricken out as not responsive to the question. I asked if this picture looks like it.

The WITNESS: It resembles it in some way.

Mr. EVERETT: I am not talking to you.

The WITNESS: Excuse me.

The COURT: That portion of the answer in reference to no place to hang on a door at all, is excluded from the jury. The other portion of the answer may stand.

Mr. EVERETT:

Q. Now this stub end of the car was about four to six inches broad, wasn't it?

A. I think it was.

Q. Your foot rested on that, didn't it?

A. No sir, my feet rested on the grab iron.

Q. Where was the grab iron?

A. The grab iron was about in here, right below; about that line (indicating).

Mr. McSHANE: What line are you indicating?

A. The sill of the car. It was built on the sill of the car.

Mr. EVERETT:

Q. How far did that grab iron extend beyond this stub end?

A. Twelve or fourteen inches; that is as big as it was.

Q. How long?

A. Just like a hand stirrup on a box car, the same way, probably a little bit longer.

230 Q. That is for the purpose of holding on with your hand?

A. With your hand, yes.

Q. With a step below it?

A. No sir.

Q. Wasn't there a stirrup below that?

A. No sir.

Q. You stood with one foot on the grab iron?

A. Yes.

Q. Where was the other foot resting?

A. I had both feet on the grab iron.

Q. Wasn't there a door at that end of the car?

A. No sir.

Q. No door at all?

A. No, there was a blind door there.

Q. It was the head car, the front?

A. Yes sir.

Q. You made a statement the day of this accident, didn't you?

A. Yes sir.

Q. Is that your signature?

(Showing witness paper.)

A. Yes sir.

Q. And that is the statement you made?

A. Yes sir.
Q. The statement is in your own handwriting, isn't it?
A. Yes sir.
Q. It was true when you made it?
A. Yes.
Q. You knew more about it, and your memory was better the day of the accident than it is now, isn't that right?
A. I guess it was a little bit better, I guess.
Q. Do you know where Wagner was riding just before he got up to the semaphore pole?
231 A. Which semaphore pole do you mean?
Q. The one that brushed him off?
A. He was riding on the fifth car, the same car I was on.
Q. That is the first car?
A. Yes sir, the first car.
Q. Which part of the car was he riding on?
A. He had his both hands ahold of the grab iron, and was standing on the truss rods; on the step.
Q. These grab irons were even with the doors, were they not?
A. No sir.
Q. They didn't extend below the bottom of the car at all?
A. No sir.
Q. There was a truss beneath the bottom of the car, wasn't there?
A. I think there was.
Q. And he was standing with his feet on the truss?
A. I think so, yes.

Mr. McSHANE: What was his answer?
Mr. EVERETT: "I think so, yes."

Q. When did he get in that position?
A. As soon as he left the board on the Fort Wayne tracks, we were waiting on the Fort Wayne tracks.
Q. That is the place where you stood——
A. —before going on the Grove street tracks.
Q. Did you see him climb up there?
A. Yes sir.
Q. It isn't customary, is it, for switchman to ride in that position at all?
A. Yes, it is, there is lots of them ride in that way.
232 Q. What?
A. A man wants to see where his train is going.
Q. I asked you if it was customary for the men to ride in that way?
A. Yes sir.
Q. You were the head man there, weren't you?
A. I was the hind man, the rear brakeman.
Q. You were at the head of the train as it was going?
A. Yes sir, we were shoving in there.
Q. You were the first man?
A. Yes sir.

Q. And you were there to look out for signals or obstructions on the track?
A. Yes.
Q. And for any reason that might prevent you proceeding?
A. Yes.
Q. And you were there to give a signal to the engineer?
A. Yes. I could not give any signal. The only thing I could do is to put on the air.
Q. That was a signal, wasn't it?
A. Yes.
Q. That was the way you generally signalled, wasn't it?
A. Yes, when it comes to giving an end sign, I could give it.
Q. I didn't say anything about an end sign, but it was usual for you to signal with the air hose, the same as you have?
A. Yes.
Q. And if you pressed the air hose, it was a signal to the engineer.
A. Yes.
Q. And that is what you were riding there for?
A. Yes sir.
233 Q. And did you signal the engineer to stop?
A. No sir.
Q. Wagner had ridden on the engine, hadn't he, up to that time, the time you came to the stop?
A. I don't remember whether he rode on the engine or not.
Q. Do you know where he did ride until you stopped?
A. When we left Harrison street, I was on that car, and I never looked until we crossed over at Archer Avenue.
Q. What is the number and initials of the box car you were riding?
A. It was a Great Northern car. I don't remember the numbers. It was ten something, or so.
Q. I show you your statement that you made the day of the accident, which states it was G. N. car 1664, is that correct?
A. I think it was.
Q. And that was the number of the car, wasn't it?
A. Yes.

Mr. McSHANE: Keep your voice up.

Mr. EVERETT:

Q. You knew the number of the car, and the date of the accident, when you made this statement, didn't you?
A. Yes.
Q. Now does that refresh your recollection so that you now know the number of the car?
A. Yes sir.
Q. What was it?
A. 1664 Great Northern.
Q. As your car started up, after receiving the signal from the semaphore to pass along the track, this curved track, you were going about four miles an hour, weren't you?

234 A. Well, I figure from six to eight. You cannot exactly figure how fast you are going. A fellow has to make a rough guess, and you can't tell how fast you are going, but it was in the neighborhood of six or eight miles an hour.

Q. Did you state the day of the accident that you were going about four miles an hour? Your recollection was better with reference to the speed that day than it is now, isn't it?

A. Probably, yes.

Q. What?

A. Probably. A man cannot just tell exactly how fast he was going.

Q. You were going about as fast as a man could trot slowly?

A. Yes sir, about six to eight miles an hour to the best of my recollection.

Q. You had seen Wagner jump on and off moving cars prior to that, hadn't you?

A. Yes sir.

Q. And he had done it all right?

A. Yes.

Q. And brakemen and switchmen and conductors, in the usual line of their work, are required to jump on and off cars, are they not?

A. Yes sir.

Q. That is part of your work?

A. Yes.

Q. And Wagner had been doing that during the time you had been seeing him while working there?

A. Sometime he would do it.

Q. When it became necessary he would jump on and off cars?

A. Yes sir, in a case of necessity he would do it.

235 Q. Did you see the semaphore pole that caught him?

A. Yes sir.

Q. Before you got up to it?

A. Yes sir.

Q. It was in plain view?

A. Yes sir.

Q. Painted white?

A. Yes sir.

Q. Straight pole?

A. It was a straight pole.

Q. Straight up and down?

A. Yes.

Q. About what were the dimensions of it?

A. Oh, it was about twelve or fourteen feet high, I guess; probably sixteen feet high.

Q. And what were the dimensions of its width?

A. About four inches each way, I should judge, if not more.

Q. About four inches square?

A. Yes.

Q. It was a square pole?

A. Yes.

Q. On the top it had an arm?
A. Yes.
Q. This picture, showing you Defendant's Exhibit D, that is a picture of the pole and the track at the place where he was brushed off?
A. Let me see that.
Q. The pole marked with the letter A on it.
(Showing witness photograph.)
A. This is the pole right here, yes.
Q. Indicating a point marked with the letter A on Defendant's Exhibit D.
A. Yes.
Q. I show you Defendant's Exhibit B and call your attention to the pole marked with the letter A; isn't that the pole (showing witness)?
A. Yes.
Q. How?
A. Yes sir, that is one of the poles.
236 Q. And the track, that is the track you were on which is marked B on that Exhibit?
A. Yes.
Q. And the place where he was brushed off is marked C?
A. Yes sir.

Mr. McSHANE: Mr. Everett, I haven't been running up there and looking at the pictures, but is that the same track you are speaking of?
Mr. EVERETT: Yes.

Q. Didn't you state in your statement the day after the accident, that Wagner was riding between the first and second car when he was struck at the semaphore pole?
A. No sir.
Q. You didn't state that?
A. No sir.
Q. I call your attention to these words on your statement which I have marked Defendant's Exhibit H. Didn't you state there "We were shunting on to Grove street with five cars of silk, and he rode between the first and second car, and was struck with the semaphore post and hurt his side and back." Didn't you make that statement the day of this accident?

Mr. McSHANE: Let him look at it closely.

Mr. EVERETT:

Q. Did you make that statement?

Mr. McSHANE: Wait, please, let him read it.

The WITNESS: That is my writing, I guess.

Mr. EVERETT:

Q. You made that statement in your own handwriting, didn't you?

A. Yes.
Q. In your own handwriting?
A. Yes sir.
Q. Didn't you?
A. Yes sir.
237 Q. And made it the day of the accident?
A. Yes sir.
Q. The happening of this accident was fresh in your mind at that time, wasn't it.
A. Yes sir.
Q. What part of this train was beside the post when you stopped after the accident?
A. I think it was about the second car.
Q. About what part of the second car?
A. I should judge about the middle of the car.
Q. Did you make any measurements at that time of the distance between the two?
A. No sir, I did not.
Q. Between the post and the car?
A. No sir, but from a birdseye view I should think it was three feet.
Q. A birdseye view is one looking down from above?
A. Looking sidewise.

Mr. McSHANE:

Q. Looking what?
A. Well, I figured about three feet from the car to the post.

Mr. EVERETT: That is all.
The WITNESS: The outside.

Mr. McSHANE:

Q. What is that you say?
A. He wants to know the distance from the car to the post; I told him three or four feet.

Redirect examination.

By Mr. McSHANE:

Q. What post?
A. He wanted to know where the car stopped, I told him
238 the middle of the second car. That is where we stopped the train, and the distance from the car to the post was three feet.
Q. What was it he spoke about as being some few inches between the post and the train?

Mr. EVERETT: I object to that. The witness cannot interpret his own testimony. He has given it, and the jury have heard it.
The COURT: Objection overruled.
Mr. EVERETT: Exception.
To which ruling of the court, the defendant by its counsel, then and there duly excepted.

Mr. McSHANE:

Q. What was it you spoke about?
A. This man wanted to know the distance from the car to the post. What it was.

Mr. EVERETT: And you have stated what it was.
Mr. McSHANE: Now just a moment, please.

A. I asked you a while ago how much space there was between the side of the car and the post, and you said some few inches.

Mr. EVERETT: I object to the form of the question.
The COURT: The objection will be sustained to the manner of the examination.

Mr. McSHANE:

Q. What did you mean a while ago while answering my question?

Mr. EVERETT: I object.
The COURT: Objection sustained.

Mr. McSHANE:

Q. When that car, as you say, stopped when opposite the post where Wagner was lying, how much space was there between the inside of the post and the side of the car?
239 A. I would say about three or four inches.

Mr. EVERETT: I object to that. Wait a minute.
The COURT: Objection overruled.
Mr. EVERETT: Exception.
To which ruling of the court the defendant by its counsel then and there duly excepted.
The COURT: That was my understanding.

Mr. McSHANE:

Q. What do you say?
A. About three or four inches to the best of my knowledge.
Q. What did you mean by three or four feet?

Mr. EVERETT: I object.
The COURT: Overruled.
Mr. EVERETT: Exception.
To which ruling of the court the defendant by its counsel then and there duly excepted.

Mr. McSHANE:

Q. What did you mean by three or four feet; what did you mean, inches?

Mr. EVERETT: I object to the form of the question.

The WITNESS: I said feet.

Mr. McSHANE:

Q. You meant inches, and you said feet.

Mr. EVERETT: I want a ruling.

The COURT: What is it?

Mr. EVERETT: I object to the form of the question, "Did you mean inches?" Counsel is testifying instead of the witness and I object to the form of the question.

The COURT: Just read it.

(Question read.)

The COURT: Objection sustained, and that will be stricken out.

240 Mr. MCSHANE:

Q. What did you mean?

A. I meant three or four inches, instead of feet.

Q. When he questioned you about passing some semaphore posts on the Pennsylvania, did you note where those posts were and how many there were?

A. Yes, sir.

Q. Where were they?

A. There was one post when we were going south on the Pennsylvania tracks, there was one post at the north end of the bridge, just at the other side of the bridge.

Q. Was there any other post besides that that you know of?

A. There was a post on the north bound main of the Pennsylvania, before we went around on Grove street.

Q. And when you passed those posts, where were you riding?

A. Riding on the end car.

Q. Did you notice how much clearance there was between those posts and the side of the car?

A. There was pretty good clearance there; they were quite a distance away from the edge of the track.

Q. By the way, this statement—may I have the statement?

(Mr. Everett hands statement to Mr. McShane.)

Q. This statement is one that you made to your own employer, wasn't it?

A. Yes, sir.

Q. Did you take any numbers of these cars yourself, the day of the accident, when you delivered them?

A. No, sir, I don't remember taking any.

Q. And when you made the statements to the company, did you have the numbers? When did you make the statement?

241 A. I don't know just when the date is, the date is on there.

Q. This was after you came back from the Erie yards?

A. Yes, sir.

Q. Had you, up to that time, at any time made any notes of the number of the cars?

A. No, sir.

Q. Do you know whether or not the man you made the statement to told you what the number was?

Mr. EVERETT: I object to the form of the question.

The COURT: Objection sustained.

Mr. McSHANE:

Q. Did you know at the time you made the statement what the various numbers were?

Mr. EVERETT: I object.

The WITNESS: I know, but I didn't put them in the book.

Mr. EVERETT: Wait a minute until the court rules. The witness has already testified. He testified he made this statement.

The COURT: Never mind what the witness testified to, the objection will be sustained.

The COURT: Read the question.

Mr. McSHANE: I will ask another, your Honor.

The COURT: All right.

Mr. McSHANE:

Q. Do you remember now the numbers of the five cars?

A. No, sir.

Q. Did you then remember the numbers of all five cars?

A. Yes, sir.

Q. And from your recollection you gave the number the best you could?

A. Yes.

242 Q. But you didn't have them written down?

A. No, sir.

Mr. EVERETT: I object to the form of the question.

The COURT: Objection overruled.

Mr. EVERETT: Exception.

To which ruling of the court the defendant by its counsel then and there duly excepted.

Mr. McSHANE:

Q. Did you know up to the time that you made the statement as to whether any of these cars were in that train?

A. No sir, I did not.

Q. He speaks about your switching only in the state, I will ask you whether you have switched lots of cars?

A. Yes, sir.

Mr. EVERETT: I object to that.

The WITNESS: Oh, yes, sir.

The COURT: Overruled.

Mr. EVERETT: Exception.

To which ruling of the court the defendant by its counsel then and there duly excepted.

Mr. EVERETT: Will your honor instruct the witness not to answer until I have been given time to make an objection.

The COURT: Yes, give the attorney on the other side opportunity to make an objection and wait until the court has ruled before you answer.

Mr. McSHANE:

Q. How close to the side of the car did the nearest end of the grab iron come from where you were standing?

A. How close to the side?

243 Q. Here is the end of the car (illustrating), and this is the grab iron, how close to the edge of the car?

A. I should figure two or three inches from the end.

Q. And from that, it extended in?

A. Yes, sir.

Q. By the way, what signals could you give to the engineer from where you were?

A. The only signal I could give was to stop him.

Q. To stop the train?

A. To stop the train.

Q. In other words, cut off the air and stop the train?

A. Yes, sir.

Q. That was your kind of a signal?

A. Yes, sir.

Q. And that was your only way of signalling?

A. Yes, sir.

Mr. McSHANE: That is all.

Recross-examination.

By Mr. EVERETT:

Q. And that was sufficient to notify the engineer it was time to stop the train?

Mr. McSHANE: I object to that.

The COURT: Yes.

Mr. McSHANE: He is stopping the train instead of the engineer.

The COURT: Objection sustained.

Mr. EVERETT: Exception.

To which ruling of the court the defendant by its counsel then and there duly excepted.

244 Mr. EVERETT:

Q. And letting off the air gave the engine a signal, didn't it?

Mr. McSHANE: I object to that.

The COURT: Overruled.

Mr. EVERETT: Did you answer.

The WITNESS: What is it?

Mr. EVERETT:

Q. Letting off the air gave the engineer a signal, didn't it?

A. I didn't let off the air.

Q. I am asking you if you did let off the air, wouldn't it give the engineer a signal?

A. If I did let it off?

Q. Yes.

A. Yes, he would shove ahead the train, I suppose.
Q. If you let off the air, he would have stopped, wouldn't he?
A. If I let off the air he would stop?
Q. Yes.
A. No, sir.
Q. The engineer would?
A. No, sir. If I make a service application, put the air off easy, he would keep on shoving.
Q. If you let it off suddenly, wouldn't he stop?
A. No, sir.
Q. What was your method of signalling the engineer? To make a stop?
A. The only way I could stop him would be to put on the air myself.
Q. And would the engineer know that?
A. Certainly.
Q. And he would shut off the engine?
A. Yes, sir, the trucks would all stop.

245 Mr. EVERETT: That is all.
Mr. MCSHANE: That is all.

(Witness excused.)

Dr. FRED J. EHRMANN called as a witness on behalf of the plaintiff, having been first duly sworn was examined in chief by Mr. McShane and testified as follows:

Q. What is your name?
A. Fred J. Erhmann.
Q. And your profession?
A. Physician and Surgeon.
The COURT: What is your name, please?
A. Fred J. Erhmann.

Mr. MCSHANE:

Q. Graduate of what institution, doctor?
A. College of Physicians and Surgeons, Chicago.
Q. And what year?
A. 1893.
Q. Have you had any hospital connections since then?
A. Yes, sir.
Q. What has your hospital connections been?
A. Since graduation?
Q. Yes.
A. I was interne at the County Hospital for about 25 months, about six months at the German hospital and the last ten years or twelve I have been surgeon to St. Anthony's Hospital.
Q. You have made a specialty of surgery?
A. Yes, sir.
Q. Did you know Wagner, the plaintiff in this suit, before this accident?
A. Yes, sir.

Q. Before this accident?
A. Before the accident.
Q. When did you first see him after the accident?
246 A. I saw him on the afternoon of December 15, 1908.
Q. Whereabouts?
A. In St. Anthony's Hospital.
Q. Did you see him brought into the hospital?
A. No, sir.
Q. Where was he when you first saw him?
A. He was in bed.
Q. Was there any one with you, doctor, or did you have any assistants, or anybody?
A. I don't recall that.
Q. Now, doctor, tell the jury in your own way what examination you made, and what you discovered on that occasion.
A. He was semi-conscious at the time, and suffering, apparently suffering a great deal of pain. I aroused him enough by loud questioning, and had him point to his pelvis, that is, in the middle of his body, and found that his pulse was very rapid and weak. He was in a condition of shock.
Mr. EVERETT: He was what?
A. In a condition of shock. A local examination of his pelvis showed that he had a fracture of the pelvis. I cathe*ri*tized his bladder; that is, I passed a tube into the bladder to see if it was injured and withdrew from it some bloody urine, showing injury to the bladder. By the time I had finished the examination of urine say half an hour later, he was so I could talk to him some, and I explained to him the seriousness of his case, and the fact that his bladder was torn——

Mr. EVERETT: I object to that.
The COURT: Objection sustained.
247 Mr. EVERETT: Move to strike it out.
The COURT: Strike it out.
Mr. EVERETT: That part of his answer, "I explained to him" From there on."
The COURT: That part of his answer, as to what he explained, will be stricken.
The WITNESS: I would rather be asked questions then.

Mr. MCSHANE:

Q. How long did he remain in St. Anthony's hospital under your care?
A. Until about June 15th, 1910, when he left St. Anthony's Hospital.
Q. Do you know whether he came back after that, doctor, I mean, was he often to the hospital again after that?
A. He was in the hospital all the time from December 15th until June the 15th, some day like that.
Q. Have you any memorandum of the dates, doctor?
A. I think I have.
Q. Wasn't it September when he left the hospital?

A. That is more than I recall positively.
Q. You are not certain about that?
A. I am not certain about that.
Q. All right. Now in a general way, doctor, first give us a description of the history of the case. Just describe his case right through, doctor.

Mr. EVERETT: I object to his repeating what he has already given. Ask the doctor to go ahead and give us what other things he found.

Mr. MCSHANE: Yes, after you told about the preliminary examination, what did you do, doctor?
A. Well, under stimulation and hot water bags and regular treatment for shocks, his general condition improved, his circu-
248 latory condition. The next morning there was evidence of extravasation of urin-; that is, I mean through some hole in the bladder or urinary tract, the urine escaped into the tissues or fleshy parts of the body, so that by noon of the following day there was evidence of such extravasation; that went half way up to his naval, and almost down the left thigh, almost to the knee. I then operated on him to locate the difficulty, and located an opening in the bladder, and found the various areas through which this urine had infiltrated. I then made an incision in the thigh, and connected a tube in that opening up to the bladder hole. He lay in bed thereafter for several months, until some time in February, during which time he had considerable pain——

Mr. EVERETT: I move that be stricken out "had considerable pain."
Mr. MCSHANE: He is the attending physician.
Mr. EVERETT: No, not in that way.
Mr. MCSHANE: Yes, he is the attending physician, and if the man complained of pain, he would have the right to say so. He is the attending physician and not an expert.
Mr. EVERETT: Pain is a subjective symptom.
Mr. MCSHANE: Oh no, a layman can tell.

Q. Did he appear to be in pain, doctor?
A. Yes.

Mr. MCSHANE: Now a layman has a right to say that.
The COURT: He stated that.
Mr. MCSHANE: All right.

Q. Now doctor just before you come to that, please, before we leave the operation of the bladder, what did that operation consist of and what did you find the injury to be in the bladder?
249 A. The last part of your question I did not catch.
Q. What did that first operation consist of, and what conditions did you find existing in the bladder, what injuries had occurred there?
A. The operation consisted of a cut being made over the bladder, in the middle line above pubic bone, and a penetration through the tissues down to the bladder, where I found a hole on the left side

of the bladder, approximately, an irregular hole, approximately three quarters of an inch in length.

Q. What is the size of a bladder, doctor, when contracted and when distended?

A. The size of a bladder varies naturally.

Q. Well, normally?

A. The ordinary capacity of the bladder is no more than a pint in an adult, and of course, depending upon what changes have taken place in any bladder. In a healthy bladder, it may contract down, I suppose, to a smaller size than a fist, when it is empty.

Q. Now, where is the bladder located, doctor?

A. The bladder is located in what we know *is* the pelvis, the pelvic cavity, and is situated behind the pubic bone.

Q. What is the pubic bone?

A. The pubic bone is that portion of the pelvis which forms the front portion of the pelvic cavity, and is situated behind the hairy prominence.

Q. When you cut in front, did you cut any other place except in front?

A. I cut also into the upper portion of the thigh.

Q. Which thigh?

A. The left thigh. The inner side of the left thigh, near the perineum or below the groin.

250 Q. When you went in there, what did you do?

A. After having cut through the skin and gotten into the tissues that were infiltrated with urine, I traced the course of the infiltrated urine toward the tear in the bladder, and put a tube from the hole below, running it up to the bladder.

Q. Did you sew it up then?

A. I sewed nothing.

Q. Go right on, doctor.

A. Besides that, I put numerous drains into the different tracts around the soft tissues of the bladder, all of which were infiltrated with urine. Nothing was sewed at that time, because of this poisonous condition, and infection invariably takes place and the sutures don't hold.

Q. Pick it up right there, and go right on, doctor.

A. During the subsequent weeks he was tender about the—I want to say that at the time of the operation there was an opening in front, and I could distinctly feel a fracture of this pubic bone, just to the right, and what we know as the symphysis pubis. The bladder has a middle line where the two bones grow together. There was displacement of this bone, and the other, and on account of the infiltration, and no doubt the infection that always takes place, I made no special effort to do anything with that bone. Furthermore, his weakened condition was such that it didn't permit of much operative work. During the subsequent weeks he had tenderness about the lower half of the abdomen, and also over the left sacral iliac joint.

Q. What is that?

A. The sacral iliac joint is the joint betwen the sacrum, the middle

left of the back of the left hip bone. He was tender there
251 on every examination I made, and inflammation of the bladder took place, and pus, pussy urine was coming from the bladder steadily, despite the irrigations, and a stone formed in there.

Q. What do you mean by irrigations, doctor?

A. Washing out.

Q. How often did you wash him out?

A. He was washed out in that way really twice a day and oftener.

Q. What do you mean by inflammation there, doctor?

A. Inflammation?

Q. Yes.

A. The bladder itself, the inner lining of the bladder became inflamed, that is, swollen, thickened, discharging pus, a stone formed in the bladder, which was removed, I believe, in April.

Q. How did you remove it doctor?

A. I removed that by enlarging the original opening which had not yet healed.

Q. In front?

A. In front, yes. It was still discharging some urine, and enlarging that opening and cutting into the bladder, and removing the stone that had formed there. Incidentally, the opening of which I speak, that I made in the thigh, from which I run a tube from the opening in the bladder, had also not closed, and it was necessary to leave the old rent in the bladder, which I did, with assistance, after considerable discussion and freeing of the bladder, and cutting out the area about this original tear, and then sewed the bladder together, leaving in a drain in the bladder after I had removed the stone. The subsequent course was slow healing of the bladder wound, the opening which had remained down into the thigh, up
252 to this time, closed gradually, and no more urine was discharged from the thigh until possibly a year later, a little inflammation arose and a few little crystals of urine and pus escaped that had been retained from the previous times.

Q. From the thigh?

A. Yes, from the thigh, but that was not of much note. The bladder closed in about two months, as I recall, two or three months.

Q. After the operation, doctor?

A. After the second operation there.

Q. What did you do for the bladder after that, doctor?

A. I have irrigated that bladder at intervals at from two days to three or four weeks, washed it out during the time that he remained in the city. He had gone west and remained west for months. Some time in the beginning of last year, during which time afterwards, I did nothing for him.

Q. Until he went west, did you irrigate that bladder with the washings you have spoken of?

Q. Yes, sir, and after he returned.

Q. Until when, doctor? Commencing with the time he returned down to what time, do you recollect that?

A. Until some time in December.

Q. Of last year?
A. 1909. Then he went west.
Q. Yes.
A. When he returned, I again irrigated it at intervals of about two weeks; one week to two weeks apart, until the first of March of this year.
Q. What was the condition of the bladder during that time, doctor?

253 A. It always showed catarrh of the bladder. The bladder itself had contained quite a capacity, but at times it would not completely empty itself. I mean by that, when he urinated, or when I asked him to urinate, that sometimes the bladder would not completely empty itself, and sometimes he would retain about one ounce of urine.

Q. What did you say it was, a catarrhal condition?
A. A catarrhal condition, inflammation of the inner lining of the bladder.
Q. Due to what?
A. The injury and subsequent results.
Q. Was there a catarrhal condition the last time you examined him, doctor?
A. There was still a slight evidence of bladder catarrh.
Q. What was his condition, doctor, as to his—well I don't care about that. What do you remember about there being any anethesia in any part of the body? He had a slight area of anesthesia in any part of the body?
A. He had a small area of anesthesia, an area about 1½ inches in diameter, located at the right hip.
Q. What do you mean by anesthesia?
A. By anesthesia I mean loss of sensation. It was really a sensation of hypesthesia, a diminishing sensation; you could tell there was a loss of sensation from the rest of the area.
Q. What is the fact, doctor, as to his poor locomotion?
A. He was always limping, and he would drag, as I think it was his right leg.
Q. Die to what was that?

254 A. Well, that is due to the crushing effect of the accident, due to the displacement of the pelvic bone, and possibly due to the suffering that he would have in the sacral iliac joint where he always had tenderness.

Q. What did you diagnose the difficulty in the sacral iliac joint, what did you diagnose it to be?
A. I think the ligaments were ruptured, there was no definite displacement that I could make out.
Q. Would all these conditions you have told about, affect his strength and ability of locomotion?
A. Why, he could not—they would interfere considerably with his gait. His walk was slow. He would drag his right leg in walking, and always have to use a cane. I never saw him without any.
Q. Are the conditions, so far as the pelvic bone and his locomo-

tion, and all that, are those conditions permanent or temporary, doctor?

A. The displacements of the broken ends is permanent, but there is a firm union there.

Q. And his gait, his lameness or limp, whatever you called it, is that temporary or permanent?

A. I think that is permanent, because the one hip is lower than the other.

Q. How much is it lower than the other, approximately?

A. That might be a half inch or three quarters of an inch.

Q. What was his nervous condition, doctor, during the time he was under your care.

A. His what?

Q. His condition, so far as his nerves were concerned?

A. Well——

Q. Whether neurasthenic or not?

A. He became very neurasthenic toward the end. He
255 seemed—he had more complaint every time he came, he started to complain a good deal about the cramps in the legs at first, and always he complained of pain, and eventually he developed insomnia. This is, of course, from his own statements. He also complained of burning pains in the back, and dizziness.

Q. What is neurasthenia, doctor?

A. Well, neurasthenia is a functional nervous disorder, a disorder of the nervous system, which, on examination, I mean of the brain or cord, no definite change can be found yet makes nervous symptoms develop.

Q. And is there any certainty at all as to its duration?

A. No, sir.

Q. And it may be a perman-t condition, and yet may clear up is that right?

A. Yes, sir.

Q. May last for years, for days or for ever?

Mr. EVERETT: I object to the form of the question.

The COURT: What is the question?

(Question read as follows: May last for years, for days, or forever.)

Mr. EVERETT: I object to it.

The COURT: Objection sustained.

Mr. MCSHANE: All right.

Q. Has this man been able to labor, doctor, during the times you have seen him, since this accident?

A. No, sir.

Q. Do you think he has been able to do any kind of work; work of any kind?

256 A. I don't think he could.

Q. Did you give him those stones that you removed from his bladder?

A. What is that?

Q. Did you give him those stones that you removed from his bladder?

A. Yes, sir. Before that stone was removed, several small fragments were passed with his urination.

Mr. McSHANE:

Q. I will ask you to look at these and say whether these look like particles that you have referred to?

(Counsel hands objects to witness.)

A. Yes sir.
Q. And that you saw any of them—let me ask you, doctor, did you see any of them that was passed after the second operation, doctor?
A. I do not recall that.
Q. Well, do you know whether he did pass any?
A. Oh, yes, he did pass one that I recall.
Q. Would it be something like that, do you suppose (indicating)?
A. It was something like that.
Q. All of the stones that he passed, all that you helped to relieve him of, you gave him, did you?
A. Yes sir.
Q. Or at least those that you did give him were stones that you did relieve him of, or that he did pass to your knowledge?
A. That came from him.
Q. That came from him, that is what I mean?
A. Yes sir.
Q. Have you looked at this X-Ray picture that Dr. Potter testified to here this morning, doctor?
257 A. I think so, yes.
Q. This picture, I will show it to you.

(Counsel hands X-Ray picture to witness.)

Q. Have you seen that plate in the hall?
A. Yes, I saw that before.
Q. Does that correctly represent the condition of his pelvis now?
A. Yes, I think so.
Q. So far as the boney condition showed?
A. Yes sir.

Mr. McSHANE: I want the record to show that I am showing him the X-Ray photograph that Dr. Potter testified about this morning.

Q. Did you put any retention catheter in there after the operation, doctor, after the second one?
A. After the second operation?
Q. Yes, or do you remember?
A. I don't remember that I did.
Q. I see. Do you remember the circumference of the limbs, doctor, whether they are the same or not?
A. The limbs?
Q. Yes.
A. The thighs are alike. The left leg is three-quarters of an inch in circumference smaller than the right.

Q. To what did you attribute that, doctor?
A. I thought from inactivity.
Q. What?
A. (Continued.) I mean on account of not using the limb.
Q. Had this gait been a steady gait, doctor, or rather steady, his gait, his walk?
A. Oh, kind of a wabbling gait that he has.
258 Q. Did you advise him to go away, doctor, during the time?
A. I did.
Q. He made one trip to Colorado and one to California, is that right?
A. Yes sir.
Q. Was it the same trip or did he go twice?
A. He was to Colorado and stayed in Colorado awhile, then went to Santiago.
Q. Well, it was the same occasion?
A. That was the same.
Q. I did not know but what there were two?
A. No.

Mr. McSHANE: That is all.

Cross-examination.

By Mr. EVERETT:

Q. Doctor, the man has improved considerably since you saw him December 15th, 1908, hasn't he?
A. Yes, he is not in that shock.
Q. Neurasthenia that you speak of was a subjective symptom, was it?
A. Yes, neurasthenia is a subjective symptom.
Q. That is, you depend on what he told you?
A. Yes.
Q. In giving your opinion as to that condition?
A. That is subjective, yes sir.
Q. Has the anesthesia area disappeared?
A. No, not entirely, it has been diminished.
Q. That is merely a space of about an inch and a half
259 at his hip?
A. Yes.
Q. That has not as much feeling as other parts of the body?
A. That is the idea.
Q. That is all there is to it?
A. Yes.
Q. That is no serious impairment?
A. No serious impairment, no sir.
Q. It don't make any difference one way or the other so far as his general health is concerned?
A. No, it would not, no sir.
Q. There has been an improvement even on that, hasn't there?
A. It has lessened.

Q. By that you mean it has improved, that is, his condition has lessened?

A. Yes sir.

Q. When did you make your last examination of him, doctor?

(No response.)

Q. Just generally, I don't want the exact date?

A. Oh, sometime in February of this year.

Q. Of this year?

A. Yes sir.

Q. The bladder has healed, hasn't it?

A. The bladder has healed, yes sir.

Q. And it is performing its usual functions at the present time?

A. Pretty well, just as I stated before, sometimes it does not completely empty itself.

Q. The man has regained a good deal of his lost weight, hasn't he?

260 A. Yes.

Q. He looks healthy at the present time, doesn't he?

A. Fair.

Q. This is the plaintiff back here (indicating).

A. Yes sir, I know the gentleman.

Q. He has got good color, hasn't he?

A. Why, yes, he looks well.

Q. You take that into consideration in passing on a man's present state of health, don't you?

A. Truly.

Q. It shows that he is nourished, doesn't it?

A. Yes sir.

Q. Is that right?

A. Yes sir.

Q. It shows that his digestive organs are all right?

A. Yes sir.

Q. Now this neurasthenia may disappear in a second, may it not, like this (counsel snaps his finger)?

A. I don't know.

Q. Well——

A. I never had it happen to me.

Q. Well, do you know whether he is suffering from it now or not?

A. Well, I do—I do not know right now—but at the last examination I made, or the last time I was in conversation with him in connection with that examination.

Q. A neurasthenic is rather nervous and excitable, isn't he usually?

A. Yes sir.

Q. This man has not that condition, has he?

A. Yes, he *is*.

Q. Isn't it better for a man of that kind to get some work to do, and get his mind off of his trouble and get fresh air, and

261 exercise his muscles and body?

A. If he can, yes.

Q. Well, this man is able to do something, isn't he?
A. Well, I don't know.
Q. His mind is all right, isn't it?
A. His mind is all right, yes.
Q. There is some work he can do, is there not, outside of manual labor?
A. Yes.
Q. There are a great many things he can do?
A. Yes, he has been reading a lot, keeping his mind busy.
Q. There are a great many things that he can do in a physical way, is there not, without over-exerting himself?
A. Oh, I think so.
Q. If he got out and did physical work to the degree that he could stand it, that would improve his condition, wouldn't it?
A. Yes, if it would not increase any pain about it.
Q. Well, if the pain—if he stood a little pain, that would have a tendency to finally make that disappear, would it not?
A. Would have a tendency to increase the neurasthenia.

Mr. McSHANE:

Q. To what?
Q. Would have a tendency to increase the neurasthenia.
Q. Make it worse?
A. Yes sir.

Mr. EVERETT: I object *ot* counsel taking up my examination.
Mr. McSHANE: Well I went——
Mr. EVERETT: I understand your method and I object to it.
262 The COURT: One at a time, gentlemen.
Mr. EVERETT: I take an exception to his conduct.

Mr. EVERETT:

Q. Now if he got plenty of exercise and fresh air and ate well, that would have a tendency to make him sleep well, wouldn't it, and do away with the insomnia, isn't that true?
A. Yes.
Q. Isn't it a fact that a neurasthenic that has a law suit pending, the very fact that there is a law suit pending, keeps that on his mind, and has a tendency to retard his improvement?
A. That is very often the case.
Q. And the minute the law suit is disposed of, no matter which way it goes, the man improves more rapidly, isn't that a fact.
A. I believe that has happened often.
Q. That is what the authorities say, what the medical books say, isn't it?
A. I don't know.
Q. You never read that?
A. No sir.
Q. You are not able, or you were not able to find definitely any ligiments that were torn, were you?
A. No, not definitely, no sir.

Q. That is merely a matter of opinion that may or may not be.
A. I just judged that from the persistent tenderness.
Q. Isn't it a fact that where a man limps that the pelvis tips so as to accommodate the shortening, and finally he gets to walk normally, isn't that a fact?
A. Usually the spinal column tilts one way or the other so as to——
Q. Adapt itself to the injury?
A. Yes.
263 Q. And the man overcomes it, that is so, isn't it?
A. Yes sir.
Q. And that may happen in this case, may it not?
A. It is possible.

Mr. McSHANE: What is the answer?
(Answer read.)
Mr. EVERETT: That is all, doctor.
Mr. McSHANE: Just a minute, doctor.

Redirect examination.

By Mr. McSHANE:

Q. Has this man's nervous condition become better or worse in the last year or so?
A. Well, it has not become better. When he returned from the west——
Q. Yes.
A. —he was somewhat improved.
Q. Yes.
A. But on account of the pains in the joints and body, and so on, which he had during the cold weather in the winter, he began to get considerably more nervous.
Q. Speaking about the probabilities for a cure for neurasthenia, you say that — is possible that it may be of a short duration, what is the usual run, doctor, if there is any usual run, as to whether it is not long drawn out in the ordinary case rather than a short duration?
A. Well, the usual run is that it is slowly—gets well and returns—many of them don't recover no matter what you do. Some get well after certain treatment, like baths and massage, and stuff of that kind.
Q. By "slow" you mean a matter of years, do you not?
A. Yes sir.
Q. There is no amount of tilting of the spinal cord that
264 will ever make those pelvic bones on an even height, will they?

Mr. EVERETT: I object to the question as to its form.
The COURT: Objection sustained.

Mr. McSHANE:

Q. Well, when he says that with plenty of exercise one may correct or tend to correct a neurasthenia condition; if one is incompaci-

tated from taking that abundant exercise he is rather retarded in that regard, isn't he?

Mr. EVERETT: I object to that question.
The COURT: Objection will be sustained.
Mr. MCSHANE: All right, that is all, doctor.

Recross-examination.

By Mr. EVERETT:

Q. Doctor, these pains that you have spoken of that he complained of are subjective symptoms, are they not?
A. Yes sir.
Q. You have no way of ascertaining whether or not he has such pains?
A. I have not claimed it either.
Q. You depend entirely upon what he tells you?
A. Yes sir.
Q. And a patient may complain of pains when no such pains exist, that is possible?
A. That is possible.
Q. That is very probable and usual in cases where there is a law suit pending, isn't it?
A. Yes. Can I explain?
Mr. MCSHANE: Yes.
Mr. EVERETT: No, just a minute. I have another question
265 or two, then you may explain.
Q. You were employed in this case by the Chicago, Burlington & Quincy Railroad, weren't you?
A. Yes sir.
Q. And they paid you your bill for your services rendered in this regard?
A. They have paid me for all services rendered after he left the hospital.
Q. Yes.

Mr. MCSHANE:

Q. After or before?
A. After.
Mr. MCSHANE: Excuse me.
A. After.

Mr. EVERETT:

Q. You are associated with the Relief Department of the Chicago, Burlington & Quincy Railroad, are you not?
A. Yes sir.
Q. And you were at the time you operated on this man?
A. We were doing work at St. Anthony's Hospital.
Q. And the Chicago, Burlington & Quincy Railroad stood the expenses there at the hospital, didn't they?
A. That is more than I know.
Q. But they paid you for your bills?

A. They have paid me for whatever I haye sent in.
Q. You drew your pay right along from this Relief Association, didn't you?
A. I never drew any.
Q. What?
A. How do you mean, drew my pay right along from this Relief Association?
Q. Well, have you a regular salary with them?
A. No sir.
Q. Oh, you were paid by the job so to speak?
266 A. Well, at that time, the fact of the matter is, we were doing that work for nothing.
Q. I see.
A. (continued). In the hospital. That is the reason I said that the pay I got from the Chicago, Burlington & Quincy was what I did for Mr. Wagner after I left the hospital.
Q. Your arrangements with them was to take care of the patients at the hospital.
A. That is the way it worked.
Q. But after the patient got out of the hospital, after he was discharged from the hospital, then the Chicago, Burlington & Quincy has paid you for your work, for your services, with that exception, since then, have they not?
A. Since then with the exception of the last few months.
Q. You have not sent a bill for that?
A. Not yet, no sir.
Q. You expect to be paid for that as soon as you send it?
A. I think so.
Mr. EVERETT: That is all.

Re-redirect examination.

By Mr. MCSHANE:

Q. Doctor, you said you wanted to explain about the pain?
A. Well, I presume that he had considerable pain merely from the fact that he remained in bed for a week at a time or more, and he sent for me to come down to the place——

Mr. EVERETT: I move that statement be stricken out as not competent.
Mr. MCSHANE: Wait a minute.
267 Mr. EVERETT: Wait minute, I have got a motion pending.
Mr. MCSHANE: I think that is perfectly competent. I want to ask a question——
Mr. EVERETT: That is not proper.
The COURT: The answer will be stricken out in part there. I think perhaps you can get better results by putting questions.
Mr. EVERETT: Then the whole answer is to go out until he asks something new.
The COURT: Yes, strike it out.

Mr. McSHANE:

Q. Doctor, the times that you speak of his being in bed, were those occasions since he left the hospital?

A. Yes sir.

Q. How many such occasions have you known of?

A. Well, I have been called to his house at two different times, in that I made two calls, I mean at two different times, months apart. The last time he sent—the last time he had that,—such pain in the joints—I believe I was over at the hotel where he stopped three times.

Q. Do you know how long he was laid up at that time?

A. Why something like two weeks, maybe more.

Q. And upon the other occasion do you know how long he was laid up?

A. That was about a week.

Q. Has there ever been anything in his case, doctor, to cause you to doubt that he did have, or thought he had the pains that he complained of?

Mr. EVERETT: I object to that question.

The COURT: Read that question.

268 Mr. McSHANE: Oh, I don't care for it. That is all.

Re-recross-examination.

By Mr. EVERETT:

Q. Doctor, this man has been able to be about for some months, has he not?

A. Most of the time.

Q. You sent him west so he would get fresh air, didn't you, and change of climate?

A. Yes, sir.

Q. And he improved under that?

A. He don't get these joint pains, general pains that he complained of.

Q. Well, he improved as far as you observed?

A. Yes.

Q. That is, he gained in flesh, and so on?

A. Yes, sir.

Q. Gained in appearance and color?

A. Yes, sir.

Q. Got a healthy ruddy color in his cheeks?

A. When he returned he was in better condition than when he left.

Q. Now he looks to be in a good healthy condition when you look at him, doesn't he?

A. He looks pretty fair.

Q. In view of the injury he received you consider that with your attention, and with what you have done in this case, that you have produced a good result, you consider you have produced a good result, don't you?

A. I do.

Mr. EVERETT: That is all.

Mr. MCSHANE: That is all.

269 (Witness excused.)

LAWRENCE RYAN, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. McShane, and testified as follows:

Q. What is your name?

A. Lawrence Ryan.

Q. Your profession?

A. Physician and surgeon.

Q. Graduate of what institution, doctor?

A. Rush Medical College.

Q. Of what year?

A. 1894.

Q. Has your work been—have you made any specialty in your profession?

A. Yes, that of surgery.

Q. What has been your hospital connections, doctor, since your graduation?

A. I served an interneship at Cook County Hospital, in 1894 and 1895. And at the present time I have service at the Cook County Hospital and Presbyterian Hospital and at St. Anthony's Hospital.

Q. You mean you are on the staff of those concerns?

A. Yes, sir.

Q. What is your particular position at St. Anthony's hospital?

A. One of the attending surgeons.

Q. Well, when did you first see Mr. Wagner, doctor, the plaintiff in this case, professionally?

A. I do not know the date of first seeing him. I saw him with Dr. Ehrmann when he was there ill.

Q. How soon after he entered the hospital did you see him?

270 A. I could not tell you that, a day or two possibly.

Q. Were you in charge of the Burlington relief department, the surgical cases in the hospital at that time?

A. My recollection is I was, but I was away or something or other.

Q. I see.

A. Dr. Ehrmann took the work while I was gone.

Q. What is your best recollection as to how long it was after he entered the hospital before you saw him first?

A. Why, I think a few days.

Q. Now, doctor, in your own way, which is perhaps better than ours, will you tell these gentlemen what you did, what you found in the history of this man's case?

A. Practically what I saw and did for him was practically assisting Dr. Ehrmann.

Q. Tell all about it.

A. The first time I remember of seeing him there was shortly after he was injured, and Dr. Ehrmann had me look at him in regard to the best line of treatment to follow, in regard to the

particular type of injury that he suffered; urine extravasated, and the various exits from the bladder and body, of the urine, and what to do with his condition, and as regards the bone and so forth.

Q. What was the condition of the bone, tell us that?

A. Well, the condition, at the time I saw him first, was related to me by Dr. Ehrmann, in that *that* he had a fracture of the pelvis and a rent in the bladder, and the urine at that time was coming out, and down his thigh through an opening in front. As I remember, there was another opening some place between the two, but I have forgotten exactly where it was. Then I saw him, but I would simply speak to him or see him with Dr. Ehrmann,
271 at different times during the winter until the following spring, when the case did not seem to clear up or be as satisfactory as the patient and doctor wished. So we had a consultation——

Mr. EVERETT: I move that be stricken out.

The COURT: Yes, it will be stricken.

Mr. MCSHANE: About "wishing," your Honor, but not whether it cleared up or not.

Q. Did it make a good recovery?

A. Well, it was very tardy.

Mr. MCSHANE: Well, go ahead.

A. And the advisability of an operation was discussed for closing the rent in the bladder.

Mr. EVERETT: I move that be stricken out.

The COURT: Motion denied, except as to the advisability. We will strike that out.

Mr. EVERETT: From that word on.

The COURT: Yes, after advisability.

Mr. MCSHANE:

Q. Did you operate, doctor?

A. I assisted Dr. Ehrmann in operating.

Q. When was that now?

A. Well, it was possibly four to six months after the injury, I don't remember the exact date.

Q. Now, what did that operation consist of?

A. Opening above the pubes down to the bladder, and dissecting the bladder loose from the pubic bone, sewing up the tear in the bladder, and opening up or curetting the opening from the bladder down to the inner side of the thigh, and examining the pubic wound and sewing up the wound.

Q. You participated in that examination, did you?
272 A. Yes, sir.

Q. Then what, doctor, what was the progress of the case after that, as you recollect?

A. It progressed slowly to the point where the bladder closed and the patient regained his strength, got up and was told to get around.

Q. Do you remember about when—how long you kept the drainage there?

A. No, I don't remember exactly, but it was quite a long time.

Q. You have only a general recollection of the case?

A. That is all, yes.

Q. Do you know what his condition is as far as power of locomotion, doctor?

A. How long ago do you mean?

Q. Well, at any time?

A. Well, when I first saw him he was not able to get around at all as I recollect it for some months, possibly six or eight months after he was first injured. And after his second operation, he began to pick up strength, and was able to get around. As to the exact dates, I don't know, I don't remember them.

Q. What do you know as to his nervous condition, doctor?

A. At that time, he did not seem to be very much concerned, but I have seen him a few times this last winter, and he was very much agitated,——

Mr. EVERETT: Just a minute. I object to this doctor testifying as to his nervous condition.

Q. That is a subjective symptom, isn't it, doctor?

A. Yes.

273 Q. Well, did you treat him last winter, or did he call on you professionally?

A. Yes, he came once for—I saw him once with Dr. Ehrmann to make a general examination.

Q. But he was rather Dr. Ehrmann's patient than yours?

A. Yes, sir.

Mr. EVERETT: I object to the form of the question.

Mr. MCSHANE: What is that?

Mr. EVERETT: I will withdraw the objection.

Mr. MCSHANE: What is that?

Mr. EVERETT: I withdrew the objection.

Mr. MCSHANE: Oh.

Q. He was Dr. Ehrmann's patient?

A. Yes, always Dr. Ehrmann's patient.

Q. You just cooperated or assisted Dr. Ehrmann at the time?

A. Yes, sir.

Q. What is your opinion, doctor, as to whether or not he has been able to do any work since the last—since this accident?

A. Well, I think that would depend on the type of the work.

Q. Well, yes, any manual labor, any physical work?

A. I do not think he is able to do any manual work that requires any particular strength or dexterity now.

Q. How does he walk, doctor, as to whether he is lame or otherwise?

A. He has sort of a wabbling gait.

Q. Have you seen the picture that I showed Dr. Ehrmann?

A. I did, yes, sir.

274 Q. Does that show the condition of the bones as they are in faulty position?

A. As they were at the time he was operated on, yes.

Q. In one suffering from neurasthenia doctor,—what is neurasthenia, by the way?

A. Neurasthenia is rather a collection of functional disorders of the nervous system, or controlled by the nervous system.

Q. And that may constitute what, in the sense of disability, as to whether partial or complete or total, depending on the case?

A. Any of those in degree.

Q. As to its duration, can you say to a certainty how long it will take to clear up?

A. No way that I know of.

Q. Isn't it an accepted theory in your profession that one that has been neurasthenic—once a neurasthenic always a neurasthenic?

Mr. EVERETT: I object to the question, as to the form.

Mr. MCSHANE:

Q. Well, what is your opinion, doctor, in what is known as a genuine case of neurasthenia, as to whether that person ever does really recover or not?

A. I think some of them do.

Q. As a rule, doctor?

A. As a rule they go on——

Mr. EVERETT: I object, the doctor has already answered it. He said some of them do. There is no rule.

Mr. MCSHANE: Of course, there is an exception to the rule.

Mr. EVERETT: Well, is there a rule? That ought to be asked.

Mr. MCSHANE:

Q. As a rule——

275 The COURT: Yes, I think the objection ought to be sustained.

Mr. MCSHANE:

Q. In the common run of them, doctor?

A. As a rule——

Mr. EVERETT: I object to that.

The COURT: Yes, it will be sustained.

Mr. MCSHANE: Exception. To which ruling of the court, the plaintiff, by his counsel, then and there duly excepted.

A. As a rule, they are——

Mr. EVERETT: Just a minute.

Mr. MCSHANE: That is all, doctor.

Cross-examination.

By Mr. EVERETT:

Q. Doctor, this plaintiff in this case, has improved considerably under the treatment of you and Dr. Ehrmann, hasn't he?

A. Under Dr. Ehrmann's treatment, yes, sir.
Q. You have observed him improving?
A. Yes, sir.
Q. He has gained flesh, hasn't he?
A. I think he has.
Q. Gained color in the face, hasn't he?
A. Yes, sir.
Q. That is, his face is growing ruddy now, ruddier?
A. Yes.
Q. Than it was previous?
A. Yes, sir.
Q. In fact, he appears now, as he sits here at this table,
276 as rather a well man, as far as appearance is concerned?
A. Yes, sir.
Q. If a man is neurasthenic, why, he usually develops an expression on his face that is evidence of nervousness, doesn't he?
A. Not always.
Q. He does some times?
A. Yes, some times, sure.
Q. Ordinarily, don't they appear as though they were fatigued or worn if they are neurasthenic?
A. The neurasthenics have various types and degrees of ailments.
Q. Yes. A neurasthenic is a man who has impairment of some kind on the nerves, isn't he?
A. I don't know——
Q. Or is it a brain condition?
A. The general concensus of opinions is that it is more of a brain condition than——
Q. That is an imaginary condition that exists in the brain, or some result of a thought in the brain, isn't it?
A. It is hard to tell what the result of it is; usually, it is thought to be concerned more with the mental condition than with the peripheral nervous system.
Q. Legal litigation tends to retard the improvement of a neurasthenic?
A. That has been the experience, yes.
Q. As soon as the litigation is over, very often the neurasthenic condition disappears?
A. Some times, yes.
Q. Now, this man is able to do some out door exercise, isn't he?
277 A. I could not say.
Q. In your opinion?
A. That I could not say. I do not know what his condition is well enough in the last three months or so.
Q. He is able to walk?
A. Yes.
Q. That indicates that he is able to take exercise to a certain degree, doesn't it?
A. Yes.
Q. And he ought to get out in the air, oughtn't he?

A. I think so.
Q. And exercise as much as possible, isn't that true?
A. Not as much as possible, but I think out of door occupation, if he could concentrate his faculties, it would help him.
Q. Now there are any number of kinds of work that he could do, isn't that true, in your opinion?
A. If he can concentrate his faculties, yes.
Q. You haven't seen any impairment of his mind of any kind, have you?
A. Not outside of what was related by himself.
Q. He is able to think and speak and talk?
A. Yes.
Q. For instance, he could act as a flagman on a railroad crossing, couldn't he?
A. I think he could, if his ailment does not disable him.
Q. He can do any kind of work, which does not require the exertion of his physical strength, isn't that true?
A. That is possible, yes.
Q. That is about the way you figure it out, isn't it?
278 A. I——
Q. In your opinion——

Mr. McSHANE: Don't interrupt him, please.

A. I have not examined him for three or four months, so as to his present condition, I don't know, but as to how he was then, I think he could, yes.

Mr. EVERETT:

Q. Four months ago, you think he could, and he has improved in the last four months, hasn't he?
A. I don't know.
Q. Well, from his appearance today, wouldn't you say that he had?
A. I would not want to give an opinion on his appearance without examining him, without examining him, no.
Q. You would not want to give an opinion, without examining him?
A. No.
Q. His power of locomotion has improved during the time you have known him, hasn't it?
A. Very much.
Q. Since the accident?
A. Yes.
Q. Very much?
A. Yes.
Q. Wouldn't that indicate to you that there might be a recovery here in his power of locomotion?
A. No, I don't think so.
Q. If he has improved during the last year, why can't he continue to improve tomorrow, and from then on?
A. As regards his nervous system or his gait?

Q. As regards the walking?
A. His gait, it may improve, but he will always be disabled.
Q. But his gait may improve?
A. Yes.
279 Q. Take the foot, that alone, that may be cured, that condition?
A. It may improve, yes.

Mr. McSHANE: What is that?
The WITNESS: It may improve, yes.
Mr. EVERETT: It may improve.

Q. And the neurasthenic condition may disappear entirely?
A. That is possible.
Q. At any time?
A. Yes.
Q. In a man that has shown the improvement he has in other ways, isn't it probable that that nervous condition, neurasthenic condition will disappear after this litigation?
A. I would not predict that.
Q. Well, it is possible, isn't it?
A. It is possible, yes, sir.
Q. It would help him materially if he had the question of this litigation off his mind, wouldn't it?
A. I believe it will, yes, sir.

Mr. EVERETT: That is all.

Redirect examination.

By Mr. McSHANE:

Q. Doctor, assuming that he has a constant, catarrhal condition of the bladder, how, if at all would that affect his nervous condition?

Mr. EVERETT: I object to the question. That is on a hypothesis that is not in evidence; it does not appear.
Mr. McSHANE: That is based on the evidence, and that is what the evidence will further confirm later on.
280 The COURT: Overruled.
Mr. EVERETT: Exception.
To which ruling of the court, the defendant, by its counsel, then and there duly excepted.
A. I think it will aggravate it.

Mr. McSHANE:

Q. In other words, this condition is apt to cause a neurasthenic condition, isn't it?
A. That is the supposition.
Q. The mere adjustment of his lawsuit, if it disappointed him, might help him, and it might not, isn't that true?
A. Yes.

Mr. EVERETT: I object to the form of the question.
The COURT: Sustained. What do you mean by that?

Mr. McSHANE:

Q. Well, doctor, is there anything certain at all, as to whether the settlement of the lawsuit will improve his neurasthenic condition or whether it will not, is there anything certain about that?
A. There is nothing absolutely certain about it.
Q. It may affect it and it may not?
A. Yes.

Mr. McSHANE: That is all.

Recross-examination.

By Mr. EVERETT:

Q. Doctor, when you examined him four months ago, had not this catarrhal condition of the bladder disappeared?
A. Not wholly.
281 Q. Did you make any examination to ascertain that at that time?
A. We examined the urine at that time, yes.
Q. But it had improved a great deal, hadn't it?
A. Yes, it had, yes, sir.

Mr. EVERETT: That is all.
Mr. McSHANE: That is all.
(Witness excused.)
Mr. McSHANE: Mr. Wagner, take the stand.

JOSEPH MATT WAGNER, the plaintiff herein, called as a witness on his own behalf, being first duly sworn, was examined in chief by Mr. McShane, and testified as follows:

Q. What is your name?
A. Joseph Matt Wagner.
Q. What is your first name?
A. Joseph Matt Wagner.
Q. Joseph Matt Wagner did you say?
A. Yes, sir.
Q. How old are you?
A. 38.
Q. Where were you born?
A. Chicago.
Q. Lived here all of your life?
A. Yes, sir.
Q. What was the date of this accident?
A. December 15, 1908.
Q. Who were you working for?
A. Chicago, Burlington & Quincy.
Q. How long had you worked for the Chicago, Burlington & Quincy?
A. About 20 years.
Q. About 20 years?
A. Yes, sir.
Q. In what capacity had you served that company?

A. Well, number taker, car sealer, carder——
282 Q. Car what?

Mr. EVERETT: Car what, car sealer?
The WITNESS: Yes.

Mr. MCSHANE:

Q. Number taker, car sealer, is that what you say?
A. Number taker, car sealer, and car carder.

Mr. EVERETT: What is that?
The WITNESS: Car sealer, and switchman was the last occupation. I was time-keeper on track elevation.
Mr. EVERETT: What is that?
(Answer read.)
Mr. MCSHANE: Keep your voice up.

Q. What did you start at, what work did you start at?
A. Why, number taker.
Q. Then you became car carder?

Mr. EVERETT: I object to the repetition.
Mr. MCSHANE: I want the order of his service.
Mr. EVERETT: Well, he has given it.
The COURT: Yes, he is the plaintiff in the case.
Mr. MCSHANE: Well, I will try.

The WITNESS: Yes.
Q. How long did you work in these different capacities?
A. Oh, three and four years at a time.
Q. Well, you were switchman how long?
A. Well, five years.
Q. Before the day of the accident?
A. About.
Q. How long—what was your position on that day?
A. I was the conductor, the man in charge of that engine.
Q. How long had you been conductor?
283 A. Well, regular conductor about two months.
Q. Well, how long had you been extra conductor or any other way?
A. Well, I had served conductorship occasionally a day at a time or so.
Q. But you had only been few months then regular, is that right?
A. Yes, sir.
Q. How much did you earn as conductor at the time of this accident, how much were your average earnings?
A. 35 cents an hour.
Q. Well, how much would it average in a month?
A. Well, that is owning to the time that we would put in, sometimes 11 hours—well, we will say about $110. But they got a raise after that.
Q. What is that?
A. But they got a raise after that of 38 cents an hour.

Mr. EVERETT:

Q. Was that after your accident?
A. Yes, sir.

Mr. EVERETT: I move that be stricken out.
Mr. MCSHANE: I don't care for that.
The COURT: Strike it out.

Mr. MCSHANE:

Q. You averaged about $110 a month, is that right?
A. Yes, sir.
Q. Coming down—by the way, what was your work while conductor there? What did you do generally?
A. Why, we had what they call a roustabout engine, going from one place to another, that is going from one yard to the other. In the morning we usually delivered a car of perishable freight, or silk or something.
284 Q. Keep your voice up. You were transferring, is that right?
A. Yes, sir.
Q. What kind of cars did you handle in your transfer work?
A. All kinds of cars.
Q. Going where?
A. To different roads.
Q. Well, through stuff, loaded stuff and everything, is that right?
A. Yes, sir, yes, going beyond Chicago, to New York, and all over.
Q. That was your general work, was it?
A. Yes, sir.
Q. Coming down to the day of the accident, or even before the day of the accident, what was the first you learned of these cars that were involved in this accident?
A. What?
Q. When did you first hear of these cars that were involved in this accident?
A. Well, about 5 minutes to 7.
Q. In the morning?
A. Yes, sir.
Q. Of the day of the accident?
A. Yes, sir.
Q. You had not heard of them before?

Mr. EVERETT: I object to the form of the question.
Mr. MCSHANE: Well, I want to know.
Mr. EVERETT: I know, but——
Mr. EVERETT: Let us keep in line.
Mr. MCSHANE: No,——
Mr. EVERETT: You get started, and then don't stop.
The COURT: The form is objectionable.
285 Mr. MCSHANE: All right.

Q. When did you first get any orders or directions, in reference to these cars?

Mr. EVERETT: I object to that; he has answered it; he said 6:55 in the morning.

Mr. MCSHANE:

Q. Well, what was it that happened at 6:55 in the morning.
A. Well, I got a message that there was five cars of silk coming in.

Mr. EVERETT: I object to his message.
The COURT: Yes.
Mr. EVERETT: As not binding on this company.

Mr. MCSHANE:

Q. Where did you first see the cars?
A. Saw three cars about 7 30 in the morning or 7:40, about that time.
Q. Where did you see them?
A. At the 14th street passenger yard.
Q. Were they in a train?
A. Yes, sir.

Mr. EVERETT: I object — it; the witness ought to be able to describe it.

Mr. MCSHANE:

Q. Coupled up, Mr. Wagner?
A. Yes, sir, coupled up, they were in a train.
Q. Where did you see them?
A. They were in a regular St. Paul passenger train, Minneapolis passenger train, on the Burlington.
Q. Three of them?
A. Yes, sir.
Q. When did that train arrive?

Mr. EVERETT:

Q. Do you know of your own knowledge?
A. I am not positive just——
Q. You were not there when they came in on the St. Paul, were you?
286 A. Well, they came in the Union depot, came in the Union depot here of the Burlington.

Mr. EVERETT: I ask that that be stricken out; the witness is not testifying from his own knowledge.
The COURT: We can find out in just a minute, just a minute.
Mr. MCSHANE: Yes.
The COURT: Then I will sustain the objection, if he does not know.
Mr. MCSHANE: Yes.

Q. Do you know what time that train arrived in Chicago, the regular time?
A. Well, I am not just positive about the time.

Mr. EVERETT: I object to the regular time.

Mr. McSHANE: Well, about what time?
A. About 7:30.
Q. Well, were those cars in the train when you saw it or where?
A. Yes, they were right in the Saint Paul and Minneapolis *St. Paul and Minneapolis* passenger train that comes from Minneapolis.
Q. Now, where were the other cars when you first saw them?
A. I seen them going down to the depot about nine o'clock, right on the St. Paul & Minneapolis train.
Q. Were there two St. Paul and Minneapolis trains?
A. Yes, sir.
Q. What was their number?
A. One was 50 the first train, due about 7:30; the 9 o'clock was 48.
Q. Both from St. Paul and Minneapolis?
A. Yes, sir.

287 Mr. EVERETT: I object to the form of the question.

A. Originated at Minneapolis.

The COURT: He has answered.
Mr. McSHANE: All right.

Q. What kind of cars were they, I mean what road did they belong to?
A. Great Northern baggage cars.
Q. Well, did you take them out of the train?

Mr. EVERETT: I object to that as leading.
The COURT: The objection will be sustained. He is the plaintiff here, don't lead him, let him tell what was said and done. Don't lead him.

Mr. McSHANE:

Q. What was the first thing your crew did in reference to those cars?
A. Well, the first three cars on 50, that is the first train,——
Q. Yes.
A. I took them from the 14th street passenger yard and brought them down to Harrison street.
Q. Did you take them out of that train?
A. Yes, sir, I took them out of that train. They were on the head end of the train, I took them right off the head end of the train, and took them down.
Q. And the other two cars?
A. Well, just as soon as this St. Paul & Minneapolis passenger train came in, the switchman pulled them back and I asked the Fort Wayne yardmaster if we could not cut——

Mr. McSHANE: No, no.
Mr. EVERETT: I object.
The COURT: Strike it out.

Mr. McSHANE:

Q. They pulled them back, what did they do?

288 A. They pulled them back; I had them cut the two hind cars off, that was next to the engine. I took hold of them there at 16th street, and I then put one against the other three cars, and the one that had the shipment in for——

Mr. EVERETT: I object to that.

A. For the Grand Trunk, Toronto.

Mr. EVERETT: Just a minute.

The COURT: That portion of the answer will be excluded.

Mr. McSHANE: Well, we will come to that in a moment. Anyhow, you put the five cars together, did you?

A. I took one down to the Harrison street platform.

Q. Just one?

A. Yes, took the shipment out for the Grand Trunk.

Q. At the freight house?

A. Freight house, yes, sir.

Q. Did you see the contents of the cars?

A. Yes, sir.

Mr. EVERETT: Objected to as immaterial.

A. Yes, sir, these bales of silk.

Mr. EVERETT: I object to it—I don't care, but——

A. They are for New York, that is——

Mr. EVERETT: Just a minute.

The COURT: Just a minute.

Mr. EVERETT: I wish the court would instruct the witness not to answer.

The COURT: Just a minute, Mr. Wagner. When the attorney makes an objection, wait until you see whether it is passed upon by the court. (Addressing Mr. Everett:) What is the objection?

Mr. EVERETT: I object to the contents of the car as immaterial in this case.

289 Mr. McSHANE: That is showing the general character, and origin and destination, your Honor.

Mr. EVERETT: That is immaterial.

Mr. McSHANE: I have alleged some things like that in my declaration. It does no harm to prove it. I think it is important, perhaps, while I don't care——

Mr. EVERETT: It is immaterial in this case—Mr. McShane has announced to the court it is immaterial.

The COURT: Well, it may stand.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. McSHANE:

Q. What did you see in the car?

A. Bales of silk.
Q. What was on the label, if anything?

Mr. EVERETT: I object to that.

A. Why, they are bound——

Mr. MCSHANE: Just a minute, when he says he objects, just you stop.
The COURT: What was the question?

Mr. MCSHANE:

Q. What were the labels, if there were any?

The COURT: Yes, that is immaterial. Objection sustained.
Mr. MCSHANE: What was the—describe what you saw about those things?
Mr. EVERETT: I object to that.

A. Well,——

Mr. EVERETT: Wait a minute, it is immaterial, going into the contents of those cars. Further than that, he has announced to
290 the court that——

Mr. MCSHANE: It is just to show what it was loaded with, your Honor.
Mr. EVERETT: Well, he has shown they were loaded with silk.
Mr. MCSHANE: I want to show where it was going.
The COURT: If he knows where it was going, he can tell.
Mr. MCSHANE: Yes.
Mr. EVERETT: I object to that.

A. The bales were marked "New York."
Q. What is that?
A. The bales were marked "New York."

Mr. EVERETT: I move to strike that out.
The COURT: That answer will be stricken out. Let him tell, if he knows where it was going, if he can.
Mr. MCSHANE: Yes.

Q. Do you know where it was going?
A. Yes, New York.

Mr. EVERETT: I object to the question.
Mr. MCSHANE: All right.
The COURT: He says he knows; the objection will be overruled.
Mr. EVERETT: Exception.
To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. Did you notice when those cars came in, whether they were sealed or unsealed?
A. There was U. S. Custom inbound seals on them, "received at Seattle."
Q. Received where?

A. Received at Seattle or Tacoma, Washington.

291 Mr. EVERETT: I move to strike it out, that is not the best evidence.

The COURT: The answer will be stricken.

Mr. MCSHANE:

Q. Just, Mr. Wagner, you describe, if you will, how they were sealed, just describe the seals.

Mr. EVERETT: I object to that as immaterial in this case.

Mr. MCSHANE: That is the same proposition, your Honor.

The COURT: If I am not mistaken, I thought that proposition was not in this case.

Mr. EVERETT: He told this court that was not in this case, at the time we argued the demurrer.

Mr. MCSHANE: Wait a minute, wait a minute. I do not think it is a necessary element in this case. Now, whether it is in this case, or whether it is not, is a question beyond me, if the court please. The Supreme Court in passing on that Employers' Liability Law, is extending it to one thing and another. Whether it is in this case or not, I don't know, but if it is, why we want to prove the facts, that is all.

Mr. EVERETT: He told your Honor, that was not in this case, that he would withdraw it if the court would sustain it.

The COURT: Let the reporter read the stipulation.

Mr. EVERETT: The reporter is not here that took the stipulation.

Mr. MCSHANE: We need not waste time on that. I said this, rather as a bargain; he did not take me up at the time. I said that I was willing to agree, if necessary, that that was not in this case. I said that——

292 Mr. EVERETT: You told the court also that it was not in this case.

Mr. MCSHANE: Just a minute, just a minute, I said that, but he did not take me up, he did not take me up. I was willing to make the concession to get to trial. I was willing to make the concession. If the court thinks I ought to be held by that, well, *in* good. I said now here, that is——

The COURT: The only point is this: As far as it goes, it does not appear, but the gentleman seems to insist that he did agree. The court is not going to decide whether he did or not.

Mr. MCSHANE: Here is the question: We are not playing horse on that. There is no question but what I said that.

Mr. EVERETT: Yes, there is.

Mr. MCSHANE: No, no, I said, I will stipulate in this case that that feature is out of the case, I said that.

The COURT: Yes.

Mr. MCSHANE: I said that, but he kept on talking, no, no, you did this, you did that, you did the other. Then when he did not prevail, whether I should be held——

The COURT: All the court's recollection is that the court said for the reporter to make a note of the stipulation.

Mr. EVERETT: It is not this reporter. There was another one here; they keep changing.

The COURT: Yes.

Mr. MCSHANE: There is no question about that. Here is what I said. The court did not consider that had anything to do with it. I am inclined to think it is not in the case, that is my judgment on it. But if there is anything in it, that this man is entitled to,
293 I want it, unless you say I ought not to have it.

The COURT: Well, I don't see how I can do anything. I want to find out what you said.

Mr. MCSHANE: We don't differ; we are not telling any stories as to what was said. I said just that thing, that "I am willing to stipulate that is not in this case. At that time, you had not passed on the other proposition, and I wanted a trial, and I was willing to make a concession. He did not accept that concession. So that if the court thinks I should be bound by it, that I ought to be required to make it, all right. I do not know, if it is so, I am willing to abide by it. I do not think that I ought to be compelled to make it.

The COURT: Well, an attorney must try a lawsuit the best he can for the interest of his client.

Mr. MCSHANE: If you think I ought to, in fairness, stand by the offer, although I say it was not accepted, all right.

The COURT: What I wanted to do the other morning was to get you gentlemen — agree about your pleadings.

Mr. MCSHANE: Yes.

The COURT: It did not make any difference to the court.

Mr. MCSHANE: It is my judgment, it does not make any difference in this case, I am candid to say that, but I don't know—if there is anything beneficial here to this man, why, I want it—I do not ask you to rule along that line, but I mean to say I want that understood, it is my judgment that it is not in this case.

294 Mr. EVERETT: It is my judgment, that is what you told the court before, and the court took your word for it and sustained your demurrer.

Mr. MCSHANE: No, it had nothing to do with it.

Mr. EVERETT: The court knows whether it did or not, it did not announce in its decision whether it had or not, but you made that statement at that time, and we went to trial on the theory that the Employers' Liability Act was not in this case.

The COURT: Well, you gentlemen seemed to make an agreement, and I sustained the demurrer. I do not know why I did it, I know that——

Mr. EVERETT: What further agreement could we make but that it was not in the case? The court remembers that there was an agreement made, that is the only thing.

The COURT: If your—if it is your judgment it is not in the case, I think you had better keep it out.

Mr. MCSHANE: Well, that is right, if you think I ought to do so.

The COURT: If you don't think it is in the case——

Mr. MCSHANE: It is my judgment it is not. Here is my thought

now in that connection: I will just tell you. Our Supreme Court has used language at different times that implied that one company, on the tracks of another must be deemed the servant——

Mr. EVERETT: I don't think that this discussion ought to be held at this place, if he is going to discuss the law.

Mr. MCSHANE: I am through with it.

Mr. EVERETT: You are making an argument in the hearing of the jury.

Mr. MCSHANE: Whether he be held to be that servant, as
295 held within the sense of the Employers' Liability Law, I don't know. That is the thought I had in my mind. They said, in legal contemplation, he must be deemed as the servant of the owning company. Whether he is such servant within the meaning of the Employers' Liability Law, I don't know. When I put that in, I felt that would do no harm; it would at most be surplusage. I do not think it is in the case. I do not think he is an employe. I am not going to waste much time now. If you think that I should—if it is the court's understanding that that was rather the sense of the agreement, I am willing to stand by it.

The COURT: Well, to be frank with you, that is the way I understood it.

Mr. MCSHANE: Well, then I am willing that we go no further on that score.

Mr. EVERETT: Now, I move that be stricken out, the evidence in reference to the contents of this car, and its destination. It went in over my objection, and I renew that objection.

The COURT: There is some evidence, but I don't think there is anything to amount to much.

Mr. EVERETT: They have asked where it was from and where it was going to, the contents, what mark and what seal was on that car. That is in evidence.

The COURT: The seal question was not answered.

296 Mr. EVERETT: Yes, he said it was sealed.

The COURT: Well, I struck out the answer.

Mr. EVERETT: If it is in, I ask that, out of fairness, *that* all of the questions and answers covering those subjects be stricken out at this time. That seems to be only fair.

Mr. MCSHANE: I only suggest this in that connection, your Honor. This very thing might furnish a basis for a claim that we did not prove certain things, although unnecessary, but having alleged them——

The COURT: That is the only thing I was thinking about, but the trouble is, I do not know what is in your declaration.

Mr. MCSHANE: I have alleged in a general way that—in the original declaration, not in the other, that the road was engaged in interstate commerce, and that he was employed in interstate commerce—those are the allegations that bring it under the Employers' Liability Law.

The COURT: That is the reason I hesitated.

Mr. MCSHANE: It is only to avoid a variance.

The COURT: That question of a variance might come up.

Mr. EVERETT: It cannot come up, because that is not a material proposition to the issue in this case. That is was this railroad company guilty of furnishing a dangerous track that caused this man to be injured.

Mr. MCSHANE: Well, you agree that allegation is immaterial, do you?

297 Mr. EVERETT: Yes.

Mr. MCSHANE: That is the end of it. There will be no variance.

Mr. EVERETT: I also agree that the allegation as to interstate commerce and other allegations that would bring it within the Employers' Liability Law is immaterial, and that lack of that proof will not be a variance.

Mr. MCSHANE: All right.

The COURT: With the statement of the attorney that has just been stated here, everything that has been said here by the witness, in relation to what the contents of what that car was, how it was stamped, how it was marked in any way is excluded from your consideration.

Mr. MCSHANE:

Q. Now, Mr. Wagner, what time did you start with those cars, on this journey upon which you were injured?

A. Started—left Harrison street at 10:45 in the morning.

Q. What instructions, if any, were you given, by anybody, as to what the movement of those cars should be—in reference to what to do with these cars?

Mr. EVERETT: I object to that.

Mr. MCSHANE: I think it is competent.

Mr. EVERETT: Not binding on this railroad company, it might be on his employer.

298 Mr. MCSHANE: I want to show that he went the way he was directed; I want to show the directions he was given.

The COURT: Read the question.

(Question read.)

The COURT: The question is too broad; the objection is sustained.

Mr. MCSHANE:

Q. Did you receive any directions, in reference to the delivery of these cars, from your employer?

Mr. EVERETT: I want that answered yes or no.

A. Yes, I got instructions——

Mr. EVERETT: Just a minute.

Mr. MCSHANE: Just a minute, Mr. Wagner.

The COURT: Just stop, you have answered the question.

A. Yes.

Mr. MCSHANE:

Q. You did?

A. Yes.

Q. Who gave you the directions that were given?

Mr. EVERETT: I object to that.
The COURT: Overruled.
Mr. EVERETT: Exception.
To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

299 A. Why——

Mr. MCSHANE:

Q. Go ahead.
A. Some chief clerk in the superintendent's office.

Mr. EVERETT: I move that answer be stricken out, the question and answer, both, because it is indefinite, and does not mean anything, and ought not be binding either upon the defendant sued here.
Mr. MCSHANE: It is not a question of binding on the defendant at all, it is a question of whether these men were right or wrong, which is a matter you are not concerned in.
The COURT: Overruled.
Mr. EVERETT: Exception.
To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. Who was this clerk, or chief superintendent?
A. Why, he called me up.
Mr. EVERETT: Just a minute.
A. He called me up on the telephone.
Mr. EVERETT: Just a minute. He asked who was the man, and the witness started out and said "he called me up," so the question shows the answer is not responsive.
The COURT: Answer the question.
A. I cannot remember his name.

Mr. MCSHANE:

Q. Well, what was his position, in a general way?
300 A. Why, he was a clerk in the superintendent's office.
Q. What conversation did you have, if any?

Mr. EVERETT: I object.
Mr. MCSHANE: What?
The COURT: Do you object to that?
Mr. EVERETT: I object to a conversation between a clerk of the superintendent's office and this plaintiff.
Mr. MCSHANE: That is perfectly proper, Mr. Everett.
Mr. EVERETT: Not binding at all upon this defendant sued in this case.
The COURT: Overruled.
Mr. EVERETT: Exception.

To which ruling of the court the defendant by its counsel, then and there duly excepted.

Mr. McSHANE:

Q. Go ahead.

A. Why I got instructions to take the cars over the quickest possible way, that they should make passenger train time.

Mr. EVERETT: I move that be stricken out as not a conversation but a conclusion of this witness.

Mr. McSHANE: Yes, I think that is not a conclusion.

Mr. EVERETT: He said "I got instructions to do so and so". He asked him to tell what was told him.

Mr. McSHANE: Well, give the conversation, give us the conversation.

Mr. EVERETT: My motion is to strike the answer out.

Mr. McSHANE: All right, strike it out.

301 Q. What did he tell you now, what was the conversation, what was said between you, if anything?

A. Why he told me to——

Mr. EVERETT: I object to that because he has not designated who he was talking to, or where?

Mr. McSHANE: Yes, he has.

Mr. EVERETT: Or where the parties were.

Mr. McSHANE:

Q. Go ahead.

The COURT: Perhaps there may be some reason for that objection, perhaps that is a good objection.

Mr. EVERETT: How can I cross examine or produce the man that he alleges he has talked with when he does not — who it was or where it was?

A. I cannot remember his name——

Mr. EVERETT: Just a minute.

The COURT: Yes, I stated that that objection, that I thought that objection to that question should be sustained; there should be something connecting the man from whom he got his orders.

Mr. EVERETT: So that we could find him.

Mr. McSHANE:

Q. What connection, if any, did this superintendent's clerk have with this work so far as you know.

A. I don't understand you.

Q. What connection, if any, did the superintendent's clerk have with the work about these cars?

A. Why, he has been in the habit of giving those instructions, if they should go the ordinary channel,—make any movements out of the ordinary channel, calling me up.

302 Mr. EVERETT: Read the answer.

(Answer read.)

Mr. MCSHANE: I think that is proper.

The COURT: Overruled.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

The COURT: Motion denied.

Mr. EVERETT: He does not designate the man in any way.

The COURT: What is that?

Mr. EVERETT: He does not designate the man in any way.

Mr. MCSHANE: It does not make any difference.

Mr. EVERETT: Nobody can find him.

Mr. MCSHANE: It does not make any difference, if he tells what his position was, and what has been proved about it.

Q. What was the conversation?

A. Why the conversation was——

Mr. EVERETT: I object to the conversation because they have not designated the person to whom he was talking sufficiently so that we can cross examine him, or that we can bring the man in the court room here to dispute the testimony.

Mr. MCSHANE: Go ahead.

Mr. EVERETT: No, don't go ahead, let the court rule.

Mr. MCSHANE:

Q. Go ahead.

303 Mr. EVERETT: No. When you are the court you can tell the witness to go ahead, but let the court rule.

The COURT: I overruled the objection to the last question or denied the motion, for another reason. I thought that perhaps this man ought to be able to show in what manner he got these orders, from whom, and whether or not in the usual course of business.

Mr. MCSHANE: That is what I am getting at. He said "This was the man who gives orders, if there is anything out of the usual."

The COURT: Did he say it just that way, that is the question?

Mr. EVERETT: Not as counsel said.

Mr. MCSHANE:

Q. Who was this man, tell us again?

A. He was a clerk in the superintendent's office.

Q. Well, what did he have to do with the movement of cars of this kind, if you know?

A. Why, if they got a message that cars wanted to make passenger train time he would give such instructions if the cars were delayed.

Q. What did he say to you, if anything?

A. Why he told me to take the cars over the quickest way——

Mr. EVERETT: I object unless the time and place of this conversation is fixed, and the person with whom he was talking.

Mr. McSHANE:

Q. Well, when was it that you had this talk?
304 A. Why that was about nine o'clock in the morning.
Q. Now then, what was it?

Mr. EVERETT: I object, he has not fixed the place.

Mr. McSHANE:

Q. Well, where was it?
A. It was at Harrison street at the telephone.
Q. It was at Harrison street at the telephone?
A. Yes.
Q. Where was this man?
A. He was at Canal street at the superintendent's office.

Mr. EVERETT:

Q. Do you know where he was of your own knowledge?
A. Well, that is where he said he was.

Mr. EVERETT: Well, I move to strike it out.

Mr. McSHANE:

Q. Did you——

Mr. EVERETT: Just a minute, I made a motion.

Mr. McSHANE: We will consent.
Mr. EVERETT: You wait until——
The COURT: If he cannot connect it up this will have to be stricken out. We will have to go a little way to see what he said.

Mr. McSHANE:

Q. Did you call at the superintendent's office or did he call up?

Mr. EVERETT: I object to the form of question.

Mr. McSHANE:

Q. How did you get into telephone communication with him?
A. He called me up.
Q. What was said?

Mr. EVERETT: Object to that for the reason they have not identified the parties, and it is not competent to bind this defendant.
305 Mr. McSHANE: Let me ask him this.

Q. Was that the regular way in which you were accustomed to get orders from the superintendent's office?
A. Yes.
Q. Yes. Now then, what orders did you get?

Mr. EVERETT: I object to that.

Mr. McSHANE:

Q. Over the telephone?

Mr. EVERETT: I object to that question as not identifying the person who was talking to him, and it is not competent as being binding on the defendant.

Mr. McSHANE: Now——

The COURT: Just a minute. I want to hear counsel for the defendant until he gets through.

Mr. EVERETT: That is all I had to say if the court got what I said.

The COURT: Yes.

Mr. McSHANE: Let me make this suggestion. By other evidence we have sought to show that this railroad, the Chicago, Burlington & Quincy had a right to use the track, that they paid for it. Counsel has examined these other people with a view of determining whether this man directed this man, directed him to go that way. I think it is entirely proper whether he did it on his own responsibility or not, but I think we have a right to show as between the man and his employer that he really was directed to go that way. Whether the man had authority to do it, or whether he did not, if he directed him to do it, I don't see makes any difference.

306 The COURT: The only proposition in my mind is——

Mr. McSHANE: Yes.

The COURT (continuing): —is, did the clerk have the authority, that is, it is for him to show that he was acting in the ordinary line of his business, and had authority to transact a business.

Mr. McSHANE: Yes.

The COURT: I suppose there must be a showing some place, somehow that he knew whom he was talking to, and that he was his superior officer. That is what I want to know; that is the reason I did not sustain the objection.

Mr. EVERETT: The witness himself stated that this was an unusual shipment.

The COURT: Yes.

Mr. EVERETT: That it was not the ordinary course.

Mr. McSHANE: It was not ordinary.

The COURT: The jury heard that statement?

Mr. EVERETT: Yes.

The COURT: I have permitted it to go in.

Mr. McSHANE:

Q. When this man talked to you over the telephone how did you know he was talking from the superintendent's office?

A. He told me that this was that fellow Johnson's office.

Q. Who?

A. The superintendent's office, 16th and Canal street, C., B. & Q.

Q. Well, what did he say to you?

Mr. EVERETT: I object to that for the reason I have already stated. The court sees the position we are placed in; we cannot go

307 and put our hands on the man that he talked with nor the time—yes, he did say that—we cannot bring the man in.

The COURT: I think the conversation should be absolutely excluded unless it can be shown that he was talking with some one in the usual place for him to transact business, or something or other.

Mr. MCSHANE: Yes.

The COURT: So that he knew that he was talking to the company's place.

Mr. MCSHANE: Let me suggest. Suppose the man told you to go that way, and suppose that man had no authority at all.

The COURT: That is right but that don't cut any figure about the point in question. If you want the conversation, I will exclude it unless you can get it in the regular line of transacting the company's business.

Mr. MCSHANE:

Q. When you were called up over the telephone, Wagner, you were at the phone, or did some one call you to the phone?

A. The number taker came over and called me to the telephone.

Q. Did he tell you what they wanted?

A. Yes, he told me——

Mr. MCSHANE: I object to a conversation with the number taker.

The COURT: Objection sustained.

Mr. MCSHANE:

Q. Anyhow, no matter who brought you over to the telephone, what was the conversation over the telephone.

308 Mr. EVERETT: I object to that.

Mr. MCSHANE:

Q. Without reference to the direction of the cars, but what conversation occurred, if any, as to whether they inquired who you were, and you inquired who they were?

A. Yes.

Mr. EVERETT: Wait a minute, I object to that.

The COURT: I presume that if counsel will permit me without interrupting, in order to clear this up you might just ask the man just what telephone it was, whose it was, who was in control of it.

Mr. MCSHANE:

Q. Well, do you know Wagner whose telephone it was?

A. Why it was the C., B. & Q. phone, private phone.

Q. Do you know where it connected at the other end?

A. Yes sir—but the Exchange was Canal street.

Q. What, a private phone?

A. Yes, they have a private line, yes.

Q. What is that?

(Answer read.)

Mr. MCSHANE: May I ask a question here?

The COURT: Yes.

Mr. EVERETT:

Q. Was that one of the Chicago Telephone Company's telephones?
A. They have—there is a private line from the yard office, around the yard offices and general offices.

Mr. McSHANE:

Q. Now what is at the Canal street?
A. Well——
Q. What offices are there?
A. Well, the superintendent's offices are at Canal street and the trainmaster that operates the train.
Q. What was this telephone that you were talking through,
309 one that led from 16th street to the——
A. Yes.

Mr. EVERETT: I object to that as leading and suggestive.

Mr. McSHANE:

Q. Now what occurred, what was said as to who you were and who the other man was in that telephone talk, if any one?

Mr. EVERETT: I object to the conversation.
The COURT: Yes, the objection will be overruled.
Mr. EVERETT: Exception.
To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. McSHANE:

Q. Go ahead, Mr. Wagner. The court says you may answer that. Go ahead.
A. Why he told me that these cars were badly delayed; to get them over there the quickest way that I possibly could. Well, I said that the Fort Wayne was the quickest way. "Well," he said "take them that way," he says "get them over there as quick as you can, they have been badly delayed."
Q. Over where?
A. Over the Fort Wayne.
Q. To where?
A. To Grove street.
Q. Well, where were you going to take them, to California?
A. To the Erie, 51st Street yard.
Q. What other way was there?

310 Mr. EVERETT: Wait a minute. I move to exclude the answer as to the talk he had with this imaginary person on the telephone as incompetent and not binding upon this defendant.
The COURT: Yes, the motion will be denied except as to one portion. I think that a portion, what he said himself, is objectionable. The directions and instructions are responsive to the question; the rest of it will be excluded as to what he said himself. Proceed, Motion denied.
Mr. EVERETT: Exception to the ruling.

To which ruling of the court the defendant by its counsel, then and there duly excepted.

Mr. McSHANE: That is, what the plaintiff said will be excluded, your Honor, is that the point?

The COURT: Yes, that part of the instructions, yes.

Mr. McSHANE: Yes.

Q. What other way, Mr. Wagner, was there from where these cars were to the Erie, except the way that you did go, what other way was there?

A. Over the Air Line, 16th street.

Q. And what way was that?

A. That is a roundabout way.

Q. What do you know, if anything, from your prior experience as to whether on that Air Line way there was or was not likely to be a blockade?

Mr. EVERETT: I object to that.

The COURT: The objection will be sustained.

311 Mr. McSHANE: Exception.

To which ruling of the court the plaintiff by his counsel, then and there duly excepted.

Mr. McSHANE:

Q. What do you know, if anything—what had been your prior experience, if any, in going the other way, as to whether you could get through freely or whether it took a longer time?

Mr. EVERETT: I object to that.

The COURT: He may answer that.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

A. It would always take a longer time to go over the Air Line; the Chicago, Rock Island & Pacific and the Lake Shore passenger trains would always block us a half an hour or an hour.

Mr. EVERETT: I move to strike it out.

The COURT: Motion denied.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. McSHANE:

Q. Now Wagner, how did you go when you started?

A. Well, we left Harrison street at 10:45. We got on the Fort Wayne tracks at 12th Street.

Q. Yes.

A. And we went south to 17th street, and the Fort Wayne switch tender there,—they have a Y going to the Q. there—he thought we were going back, you see——

Mr. EVERETT: I object to what the switch tender thought
312 and I move to strike it out.
The COURT: Yes, that may be stricken out. The jury will disregard it.

A. Well, I told him that we were going to tell the tower man——

Mr. EVERETT: I object to what talk he had with the switch tender.
The COURT: That statement of what he told him will be excluded and the jury will disregard it.

Mr. MCSHANE: I don't care for that.
The COURT: Just answer the question, Mr. Wagner, and we will get along faster.

Mr. MCSHANE:

Q. Did you open any of the switches?
A. No sir.

Mr. EVERETT: I object to that as leading and suggestive without letting the witness answer.
The COURT: Let the witness answer.
Mr. EVERETT: What?
The COURT: He may answer.
Mr. EVERETT: Exception.
To which ruling of the court the defendant, by its counsel then and there duly excepted.

Mr. MCSHANE:

Q. How did you get on this track on which you were injured, who threw the switches, if anybody?
A. Why the switch tender.
Q. Now coming down to the track in question, were you on your way to the Erie then?
A. Well, the switch tender threw——
Q. No, no. When you were making this movement at the time of the accident, were you on your way to the Erie?
A. Yes sir.
Q. You were moving around that curved track, that we
313 have talked of so much, the engine was moving along pushing the cars, was it?
A. Yes sir, the engine was pushing the cars.
Q. Where were you?
A. I was on the first car that we were pushing, about fifteen feet from the end of the car.
Q. From the forward edge?
A. Hanging there on the two hand holds at the end of the door.
Q. Yes.
A. The door post and the——
Q. What were you standing on?
A. And I was standing on a ladder step that is underneath the baggage car.
Q. Yes. Whereabouts was your body in reference to the bottom of the door?

A. My body was about here (indicating).
Q. Now you were indicating about the bottom line of your vest or your abdomen?
A. Yes.
Mr. EVERETT: About the hip line?
Mr. MCSHANE: Above the hip line, somewhere along there.
A. Just about there (indicating).
Mr. EVERETT: About the hip joint.
Mr. MCSHANE: No, that is a little high.
Mr. EVERETT: Where do you want it?
A. Here (indicating).
Mr. MCSHANE: I want it wherever the jury can see that it is. He is indicating about the bottom of his vest.
Mr. EVERETT: All right.
Mr. MCSHANE: About maybe a little above the hip joint. All right, sit down, Mr. Wagner.
A. The sill was about that wide, six inches or eight inches.

Mr. MCSHANE:

Q. What sill do you now speak of?
314 A. The car sill.
Q. At the door?
A. Yes sir.
Q. Was the door flush with the side of the car, or how was it?
A. Oh, no, in probably about four or five inches, came in probably about four or five inches.
Q. How wide was the door?
A. Oh, about four feet.
Q. And these handles, which way did they run?
A. Up and down.
Q. One on each door sill?
A. Yes sir.
Q. Did the bottom of the door—did that—was that even with the, flush with the side of the car, or did it project beyond it? Or was it back in, or how was it?

Mr. EVERETT: I object to the form of the question.
The COURT: The objection will be sustained.

Mr. MCSHANE:

Q. Describe the bottom of the door, Wagner, as to where it came with reference to the side of the car?
A. The bottom of the door?
Mr. MCSHANE: Yes, yes.
A. The bottom of the door was even with the car.
Q. It did not come out beyond the side, is that right, or did it?

Mr. EVERETT: I object to the form of question.

A. Well, it might possible be 12 inches.
The COURT: Objection sustained.
Mr. EVERETT: I move to strike it out.
The COURT: This is the plaintiff. Let him tell it in his own way.

Mr. EVERETT: I move to strike that out.
The COURT: Yes, strike it out.

315 Mr. MCSHANE:

Q. Where was your head man, Wagner, your head switchman?
A. Why he was on the front footboard of the engine.
Q. And the rear end man?
A. He was on the hind end standing there on that grab iron there at the end of the car, with the air hose, and his arm through the brake wheel.
Q. Now, the head man, head switchman, so-called, is the man who we speak of as following the engine?
A. Following the engine, yes.
Q. The other man is the rear man or field man?
A. Yes.
Q. Is one of them over the other or are they of equal authority?
A. No the man in the field, the rear man usually does things and gives the instructions.
Q. Yes sir.
A. At times, not always.
Q. Now as you were going around there did you discover any of these posts before you came to this one?
A. Yes, we passed two posts.
Q. How far were they from the side of the car?
A. About six feet.
Q. Did you see this post?
A. Yes, I saw this post.
Q. Now tell how it happened that you got caught by it?
A. Well, we were coming down there. I saw that post probably about one hundred feet or so and it looked, apparently it looked as though it had plenty of clearance, plenty of space, just like the other posts that we had passed. And I was looking down—we had those crossings to pass, so many crossings there and main tracks
316 there to pass, that I was watching the tracks there, in case that a semaphore or signal might be against us, or in case the air—anything obstructed us, and our air might fail to work.
Q. Yes, what were you there for?

Mr. EVERETT: I object to that.

A. To signal the engineer.

The COURT: The objection will be sustained.
Mr. EVERETT: I move to strike the answer out.
The COURT: It will be stricken. That is for the jury to determine what he was there for.

Mr. MCSHANE: Well go ahead, Mr. Wagner and tell all about it.
A. As we got close to the post—as we got close to the post—of course it happened so quick you know, that—well, I seen it was kind of close then, then I kind of pulled in towards the car door.
Q. Yes, then what happened to you?
A. Well, I was crushed between the baggage car and the semaphore post.

Q. Were you unconscious?
A. Yes.
Q. Did you ever go over that track before?
A. No sir.
Q. Did you know before that that there was not enough clearance between that post and that car?
A. What?
Q. Did you know before you were hurt that there was not enough clearance between that post and the car to let you pass?
A. No, I did not.
Q. What is the fact as to whether in the ordinary run there is or is not an abundance of room between such a post and the outside of the car?
317 A. There usually is.

Mr. EVERETT: I object to that.
The COURT: Objection sustained.
Mr. EVERETT: I move to strike it out.
The COURT: Was there an answer?
Mr. EVERETT: Yes.

The COURT: The answer may be stricken out. (Addressing the witness:) Don't answer when there is an objection made until the court tells you to answer.
A. I just happened to slip it out.

Mr. MCSHANE:

Q. Mr. Wagner, did your switching service around the city take you—did you go in other yards as well as the Burlington?
A. Yes sir.
Q. Upon other roads besides the Burlington?
A. Yes sir.
Q. What roads, what yards were you in before this accident?

Mr. EVERETT: I object to that.

Mr. MCSHANE:

Q. Or what yards of other companies were you in before this accident?

Mr. EVERETT: I object as immaterial.
The COURT: Overruled.
Mr. EVERETT: Exception.
To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. Go ahead.
A. I was in the Lake Shore yard, Illinois Central, Milwaukee & St. Paul, Michigan Central.
Q. Were there any of the roads that you did not have more or less to do with, any of the roads in Chicago?

318 A. What?

Q. During your service as a switchman had you been over them all or only a few of them, or what?

A. I have been over most all of them.

Q. What is the fact as to whether there was any regulation clearance between the sides of such poles and such cars?

Mr. EVERETT: I object to the question.

Mr. MCSHANE: Just a minute. What is your objection to it.

Mr. EVERETT: It is immaterial what the other yards have, how they maintain their yards, what distance they maintain between the poles and switch arms. The question is what this condition was. You charge that in the declaration.

Mr. MCSHANE: All right. As long as he has stated his position I will not press it.

Q. Now, Mr. Wagner, how fast do you think your engine, car and train was going at the time that you were struck?

A. I think about 15 miles an hour.

Q. Did you have the air all connected up? All connected up with air?

A. Yes sir.

Q. Air brake on the engine?

A. Yes sir.

Q. What part of the car did you come against?

A. Why the door sill, on the car, the sill at the door.

Q. How close to the car were you standing at the time that you ran past the post?

A. I was right close to the car.

Q. Well, how close?

A. I was right tight close against it.

Q. Where was your head and shoulders and body?

A. In the doorway of the car.

319 Q. Were they hurt, your head or shoulders or body, were they crushed?

A. Why my body was crushed, yes my body was crushed.

Q. Well, I mean above that, above that, did you escape, the upper part of your body, you did not go through?

A. No, no, I was not hurt above, not that I know of.

Q. That is what I want to know, where you were caught, where?

A. Caught right here (indicating).

Q. Right across your wasit line you were indicating, or lower down, is that right?

A. About in here (indicating), yes.

Q. What part of the car came in contact with that part of your body?

A. The bottom of the car, the sill of the car at the door.

Q. Then what did it do to you?

A. Why it crushed me between that and the semaphore post.

Q. And what happened then?

A. I fell down.

Q. Could you hold on any longer?

A. No, I fell down. I was unconscious for a minute or two, I don't know how long.
Q. And then the train stopped, I presume.
A. Yes, it stopped in about two car lengths, and a half, or so.
Q. Did you pass through the post, did you go right through it, or did you fall?
A. Well, when they picked me up I was about ten feet or so north of the post, northeast like.
Q. You had passed them, had you?
A. What?
Q. You got through, did you, in some way?
A. Yes, I got through some way. It rolled me through there.
320 Q. Sit down. What did they do with you?
A. Why they picked me up and carried me over to the switch tender's shanty at the bridge there.
Q. Were you able to stand up?
A. The patrol wagon took me——
Q. Were you able to stand up?
A. No sir.
Q. How did you feel at that time, what was your feeling?
A. Well, I had severe pain.
Q. Where?
A. In the back and in the abdomen.
Q. Did you try to stand?
A. I could not stand up.
Q. Could you move your legs or not?
A. No sir, I could not move my legs at all.
Q. How long did you remain in the switchman's shanty?
A. I do not just know, I could not tell you.
Q. Well, some little time?
A. Yes.
Q. Where did you get from there to?
A. Went to St. Anthony's Hospital.
Q. How did you get there, walk?
A. No, the patrol wagon took me there, police patrol.
Q. How did they take you from the shanty to the patrol wagon?
A. Carried me on a stretcher.
Q. From the patrol wagon into the hospital how?
A. On a stretcher.
Q. Is that hospital very far from that place?
A. Yes, it is about two and a half miles.
Q. Well, when they got you into the hospital what did they do to you? Who was the first one that you came in contact with, that you know of?
321 A. Why the interne there.
Q. Do you know who it was?
A. He was the interne at the hospital.
Q. Where did he take you?
A. He took my clothes off and put me to bed.
Q. Then what?

A. Then they injected something in my arms.
Q. Do you know what that was for?
A. Supposed to kill the pain.
Q. Were you suffering much pain?
A. Yes, I was suffering pain. I would get worse right along on the way over to the hospital. Then I become unconscious.
Q. Well, do you remember Dr. Ehrmann treating you there?
A. Well, I don't just remember it, I was unconscious.
Q. You did see him there at some time, didn't you?
A. Well, I would just see him for a moment, and then I would get unconscious.
Q. How long did you remain in the hospital, Mr. Wagner, from the time that you were taken in there?
A. Nine months and a half.
Q. Nine months and a half?
A. Yes.
Q. What date did you leave there?
A. About September 28th.
Q. Well, have you got the date?

Mr. EVERETT: He just gave it to you.
Mr. MCSHANE: I mean, have you got any memorandum of it, or are you giving us your best recollection?

A. I have got it in a little book.
Q. Well, where is the book. Have you got it written down there, that is what I want to get at?
322 A. Yes.
Q. When did you put it in there?

Mr. EVERETT: There is no dispute about that.

A. About a day or two before I left.

Mr. MCSHANE: Well, all right.

Q. September 28th of 1909?
A. Yes sir.
Q. How long were you in the—what was your condition now from the start there, just tell us right along as far as you know it?
A. Well, I was unconscious most of the time, they would let no one see me for two weeks.

Mr. EVERETT: I object to that.
The COURT: The objection will be sustained and the answer will be stricken.

Mr. MCSHANE:

Q. When was it that you were first able to walk at all, how long?
A. About six months.
Q. How long were you confined to your bed?
A. About six months, but I was pulled—they used to lift me up and sit me up occasionally for an hour or so.
Q. Well, when you started to walk did you use crutches at any time?

Mr. EVERETT: I object to the suggestion of counsel, let the witness describe it.

The COURT: Yes, let the witness describe it.

Mr. MCSHANE:

Q. How did you start when you started to walk, Wagner?

A. What?

323 Q. When you started to get about?

A. They had to guide me there for a month or so, holding me up to the chair, I could only get about four or five feet at a time.

Q. How were you able to get about when you left the hospital?

A. Why I always had severe pains, severe pains in the back here (indicating), and in the groins. I would get dizzy thereafter, and I would have to lie down and rest.

Q. How were you in the way of locomotion, about walking, when you left the hospital how much were you able to walk?

A. Well, I walked lame, I used to wabble like that (indicating). I would get pains in both hips, severe pains, and in the back.

Q. Where did you go when you left the hospital?

A. I went home.

Q. How long did you stay home before you went away from the city?

A. Well, I got a bad attach on November 17th and I had to call Dr. Ehrmann.

Q. What do you know about the operation if any was performed on you in the hospital?

A. Well, they operated on me the first time, they opened me up right here (indicating).

Q. You were indicating the front of your body?

A. Right about here (indicating).

Mr. EVERETT: There is no dispute about that.

A. Right above the penis.

Mr. EVERETT: There is no dispute about the doctor's testimony on that point.

Mr. MCSHANE: No. I will get it over with as quick as I

324 can.

Mr. EVERETT: I suppose that he was made unconscious anyhow.

Mr. MCSHANE: How did you feel after the operation, right after it, without describing the operation?

A. Well, I was very weak and in intense pain, in agony and mental distress.

Q. When was the second operation performed?

A. April 17th.

Q. What was that, if you know?

A. Well, between the—what was that, did you say?

Q. Where was that operation, about the same place?

A. They opened the bladder right here same place (indicating).

Q. Do you know what they took out of you at that time?

A. They took out some stones at that time.

Q. Have you the stones here?
A. Yes sir, they are there in that box (indicating).
Q. Who gave them to you?
A. The doctor did. I passed several stones.
Q. Tell us, if you please, when they took them out?

Mr. EVERETT: He was unconscious, wasn't he?
Mr. MCSHANE: Dr. Ehrmann gave them to him. I mean—I mean what period?

A. Well, these here things were passed between the first and second operation.
Q. Which ones are those?
A. These in the little box (indicating).
Q. How many of them are there?
A. There is seven. This triangular one Dr. Ehrmann and Dr. Timmits removed it from the head of the penis. They would take it out, and I suffered intense pain, agony.
325 Q. How large are any of those stones?
A. Well, about a quarter of an inch.
Q. How many of them?
A. Seven.
Q. Between the first and second operation?
A. Yes, I passed these through the penis.
Q. Now did that cause pain, or not?
A. Certainly I did, I suffered intense pain and agony so that if I could have got out of the window I would have jumped out.

Mr. EVERETT: I move to strike it out.
The COURT: That portion of the answer may be stricken out. The jury are instructed to disregard it.

Mr. MCSHANE:

Q. The other ones there that Dr. Ehrmann gave you, have you those stones?
A. Yes, here they are (indicating). These were removed at the second operation. There were some smaller stuff that he did not give me.
Q. Hold up the large one there.

(Witness does as requested.)

Q. How many of them have you got there?
A. Oh, there are about 25 of them here. There is a lot of small stuff that he did not save.
Q. Those he gave you, did he, you say you saved them?
A. Yes.
Q. Did you pass any more of those stones?
A. Yes, here is one that was passed two weeks after the operation, the largest one.
Q. After the second operation?
A. Yes sir.
Q. How large is that?
A. Well, that is pretty near a half an inch large. I was about

four days passing it. They were going to remove it when finally the water forced it out.

326 Q. How long did you continue to pass those stones after the second operation, how many did you pass after the second operation?

A. Just this one.

Q. That is the only one?

A. Just about two weeks after the second operation.

Q. All right. What was the fact as to the amount of feeling or sensation in your limbs, or any part of your body?

A. Well, I had intense burning sensation in the bladder all the time. I was just on—it was almost driving me crazy.

Mr. EVERETT: I move "it was almost driving me crazy" be stricken out.

Mr. MCSHANE: Yes, I don't care about that.

The COURT: Yes, that is objectionable, strike it out.

Mr. MCSHANE:

Q. From the time that——

The COURT: It may be stricken.

Mr. MCSHANE:

Q. What was done in the way or irrigating your bladder at the time you were in the hospital there?

A. Well, they irrigated with, as near as I can understand with——

Mr. EVERETT:

Q. You don't know except what they told you?

A. They irrigated it every day, sometimes twice a day. It was very painful all the time.

Mr. MCSHANE:

Q. How much did they put in there of whatever it was.

A. A couple of weeks.

Q. Put it in?

A. In the bladder, put it in, they put a catheter in, a sound, a tube into the bladder.

Q. Yes.

A. Into the penic, and the water would come out of the opening here at the bladder. They did that for——

327 The COURT: Opening where?

A. Opening here in the bladder.

Q. In the side?

A. No, not in the side, they made a cut here five and a half inches——

Q. It would go in through the penis and go out in the drainage tube, is that right?

A. Yes, come out the hole that was left open where they had the drainage tube for four months.
Q. Yes.
A. I was passing urine through a tube.
Q. For four months?
A. For four months, yes.
Q. When you would take this irrigation it would come out of the tube, would it?
A. It would come out of the tube, yes, and this urine came out of the tube.

Mr. EVERETT: I object, that is a repetition.
The COURT: Overruled.
Mr. EVERETT: Exception.
To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. Was the tube taken out at the end of four months?
A. It was taken out a little before the second operation.
Q. Now how did they after that—after that time did they irrigate the bladder?
A. Yes, they did.
Q. Well, how did the stuff come out then?
A. Well, there was a tube put in at the second operation.
Q. Yes.
A. And the urine came out of that tube for at least two weeks. Then I passed this stone.
Q. Yes.
A. After I passed this stone—the pressure of the water forced this stone out.

328 Mr. EVERETT: I object to the repetition.
The COURT: Yes, go ahead.

Mr. MCSHANE:

Q. When did they finally—was there any drainage tube there more than two weeks after the second operation, or was that the time that the last one was taken out?
A. The last one was taken out about two weeks after the second operation.
Q. Now, then, from that time down to the time you left the hospital, in this work, where did they put it, in through the penis, and it came out through the penis?

Mr. EVERETT: I object, let him describe it.

Mr. MCSHANE:

Q. Or how did it get out of the penis?

The COURT: Let him tell.

Mr. MCSHANE: Yes, let him tell.

Q. How did they irrigate?

A. Well, they——

Mr. EVERETT: I object, he has described.
The COURT: He may answer it again.
Mr. EVERETT: Exception.
To which ruling of the court the defendant by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. I mean after the tube was gone?
A. Why they irrigated the bladder, they put a sound in.
Q. In the penis?
A. A rubber hose in the penis.
Q. Yes.
A. And let about a quart of solution into the bladder.
Q. Yes, then what?
A. They let in—I do not know—about probably eight or ten quarts at a time—then they let it run out again and refilled it.
Q. I see, that is what I was getting at.
A. Kept on doing that all the time.

Q. How long have *them* been irrigating your bladder
329 that way, or how recently was it irrigated last?

A. Well, about the 20th of March or the 25th of March—about the 20th of March last I should judge.
Q. When you left the hospital where did you go. You went home, you said?
A. Yes sir.
Q. How long after you went home, how long was it before you left the city?
A. I left the city the 16th day of December.
Q. Then you were from March to December in the city, is that right—no, you left in September, you left the hospital in September. Now, when did you leave the city?
A. December 15th—16th, 1909.
Q. That is, you were in the city from September to December?
A. Yes sir.
Q. Now during that time did you see Dr. Ehrmann?
A. Yes, I was going to Dr. Ehrmann right along about every eight or ten days.
Q. How often, if at all, was the bladder irrigated during that period?
A. Well, it was irrigated off and on, sometimes every eight days, sometimes every two weeks.
Q. Now when you left the city, where did you go?
A. What?

Mr. MCSHANE: Read the question.
(Question read.)

A. I went to Denver. The doctor told me to go to Santiago, to southern California but the Company would not let me go any further than Denver.

Q. Before we leave that period, was there any—were you
330 up and about, from the time you left the hospital until you left the city, were you up and about all of the time, or not?

A. Well, I walked, I walked about five or six blocks and then I would get all exhausted and I would have to come back home and sit down, lie down and rest.

Q. Did you have any spell during that time in which you were confined to the bed?

A. Yes, the 17th day of December, the sudden change in the weather struck me down with severe pains in the groin, back and hips.

Q. How long were you laid up?

A. (continued). And with cramps in the leg.

Q. How long were you laid up?

A. About two weeks.

The COURT: I think we will suspend at this point.

Mr. MCSHANE: Very well, your Honor.

The COURT (addressing the jury): We will now take a recess until tomorrow morning at ten o'clock.

Gentlemen of the jury, remember the instructions heretofore given to you by the court not to talk about the case among yourselves, or permit anybody else to talk to you about it. Remember that, gentlemen. Be in your places promptly at ten o'clock tomorrow.

Whereupon an adjournment was taken to ten o'clock, May 17th, 1911.

331 WEDNESDAY, May 17, 1911.—10 o'clock a. m.

Court met pursuant to adjournment.

Present same as before.

JOSEPH MATT WAGNER, resumed the stand for further direct examination by Mr. McShane, and testified as follows:

Q. What was the number of the engine, Mr. Wagner, of the Burlington that your crew had at the time of this accident?

A. 1516.

Q. Do you know the number of the cars and the kind of cars they were?

A. Great Northern baggage cars.

Q. Is that your switching list?

(Handing witness document.)

A. Yes, sir.

Q. When did you make that out?

A. I made it out the night before I took the cars over.

Q. When?

A. The night before I took the cars over.

Q. The night before?

A. No, before I took the cars over.

Mr. McSHANE: There is some writing here that was apparently made after.

The WITNESS: Yes, sir.

Mr. McSHANE: I will tear that part off.

(Hands same to counsel.)

Mr. McSHANE: I will paste that on the bottom there.

(Mr. McShane again hands paper to counsel.)

332 Mr. McSHANE: Pin them all together.

Mr. EVERETT: I want to cross examine him on it.

Mr. McSHANE: Yes.

Q. Tell us what the numbers of the cars were?

Mr. EVERETT: I object; it speaks for itself.

The COURT: The objection will be sustained.

Mr. McSHANE: Have you any objection to it?

Mr. EVERETT: I just want to cross examine him on it a moment.

Mr. McSHANE: Well, go ahead on that now. That is not important.

Mr. EVERETT:

Q. There has been some erasures of these numbers, something rubbed out and something else written there?

A. No, sir.

The COURT: Talk louder, so that every one can hear what you have to say about it.

The WITNESS: No, sir.

Mr. McSHANE: They correspond with your numbers, don't they?

Mr. EVERETT: No, they do not correspond.

Q. From what did you make these entries?

A. The cars the car numbers.

Q. You wrote it right on here, or did you write it first on a piece of paper and copy it afterwards?

A. I wrote it at the car there.

Q. Well, were you standing there?

A. Yes.

Q. Where?

A. Over on Harrison street, before I left there.

Q. What is "delivered to, E. N. E.," what is that?

A. Erie.

Q. That is Erie?

A. Yes.

333 Q. Anything else?

A. I did not complete that report.

Q. What is that?

A. I did not complete that report, that is, I did not make the deliveries.

Mr. McSHANE: He entered up here (indicating), all but the time they arrived. It is introduced as "Plaintiff's Exhibit H."

The COURT: It may go in.

(Which said document so offered and received in evidence, marked "Plaintiff's Exhibit H" is in the words and figures following, to wit:

334 PLAINTIFF'S EXHIBIT H.

B–6–08–10m. Plts. Form 1630 E H

Chicago, Burlington & Quincy Railroad Co.

Burlington Route — Yard Conductor's Train Report.

Engine No. 1516 — Date Dec. 15, 1908.

Out Trip.

Left Harrison St. (Name of starting yard.) — Time 10:45 a. m.

Arrived Erie 51st st. (Foreign road or yard.) — Time ——.

In Trip.

Left Erie 51st St. (Foreign road or yard.) — Time ——.

Arrived Canal St. (Home yard.) — Time ——

Give Full Particulars.

Delayed .....

.....

.....

JOS. WAGNER, *Conductor.*

(This is copy of an envelope.)

335 Mr. MCSHANE:

Q. Do you know which one of those cars you were riding on, Mr. Wagner, at the time of the accident?
A. I do not, no.
Q. All right?
A. I do not know the number.
Q. All right. How were the cars as to width?

A. Ordinary cars.
Q. Were there any ladders on the cars, stirrups or grab-irons on the end?
A. That is all there was on there, a grab-iron on the sill, one way up, higher up, near the brake-wheel, but not sure about that.
Q. Was there any on the sides of the car?

Mr. EVERETT: I object to the repetition; this was all gone over yesterday.
The COURT: He may answer.
Mr. EVERETT: Exception.
To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. Is there any ladder there at the side of the car or at the end of the car?

Mr. EVERETT: I object.
The COURT: Objection sustained.
Mr. EVERETT: I ask that the question be stricken out.
The COURT: Strike it out.

Mr. MCSHANE:

Q. What was there, if anything, on the side of the car, on the side, at the end?
A. I didn't see anything.
Q. Well, do you know if there was anything there?
A. There was a grab iron at the end of the car.
Q. Was there anything else?
A. A brake wheel up above.
336 Q. I know, I mean in the way of ladders?
A. No, there was no ladder.
Q. I mean by that a stirrup or hand-hold?
A. Yes, running lengthwise, the length of the car.
Q. When the cars were coupled together, how close would the cars come to each other?
A. I should judge about a foot or so.
Q. In going around on the curves, would the ends come closer together or not?
A. Yes, sir, come right close.

Mr. EVERETT: I object to that.
The COURT: Objection sustained.
Mr. EVERETT: I move to strike it out.
The COURT: Strike it out.

Mr. MCSHANE:

Q. What effect did going around the curves have on the cars, in reference to whether they remained some distance apart, any part come closer together or further away?

A. Well, I understood the cars on a curve would come to about within two or three inches there.

Q. What was the custom of your company, in reference to making reports, if there was any custom, as to the road to use in going from one point to another?

Mr. EVERETT: I object as immaterial, and not binding on this defendant; there is no charge in the declaration made as to violation of any custom.

Mr. MCSHANE: I think it is proper, your Honor. His duty as a switchman and the custom when using foreign roads or tracks of this kind, to make a report to their company what tracks they use.

The COURT: I think you should tell in this matter, or what he was directed to do here.

337 Mr. MCSHANE: Well, he was hurt, and somebody else must tell.

The COURT: Was this preparatory to a question to be based on what the man did after he was injured?

Mr. MCSHANE: No, your Honor, I simply want to prove the custom, that is to say, when a conductor of a crew, when using a track of a foreign road, a track like the one in question, they make a report to their own company when they use that track, and from that report, as we have seen others check the statement of the foreign company up to see whether or not they correspond. I want to show such is the custom when they use the track of a foreign road, to make a report to their company of the track they used.

Mr. EVERETT: His report in any event is the best evidence.

Mr. MCSHANE: He didn't make it, and didn't get there, didn't finish.

Mr. EVERETT: Then the custom is immaterial if he didn't do it.

The COURT: Well, I don't suppose it amounts to much, yet at the same time——

Mr. MCSHANE:

Q. Was there any custom there, during all the time you were switchman for the Burlington, as to whether the Burlington conductors did or did not make report to their company of any foreign track they used in making delivery of cars?

Mr. EVERETT: I object to the question. The custom is not binding on the Chicago & Alton.

The COURT: The objection is overruled for the present.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

338 Mr. MCSHANE:

Q. Was there a custom?

A. Well, I made out——

Q. Wait, there was a custom. Now, tell us what the custom was?

A. We made out a switching list like the one I just showed you

there, with the car numbers, the engine and the road and the conductor and the tracks he used.

Q. And what do you do with it?

A. Turned it in to the general yardmaster at Western avenue.

Mr. EVERETT: I move to exclude the answer, since the last objection made, as incompetent in this case, and as not binding on the Chicago & Alton Railroad Company.

The COURT: I want to withhold my ruling on that for the present. The gentleman cannot put in all of his case at once. I am going to give him time to put in his case.

Mr. MCSHANE:

Q. Now, Mr. Wagner, what is the fact, while you were there as a switchman for the Burlington, your crew and other Burlington crews did use the tracks of other companies from time to time in going to the different places?

Mr. EVERETT: I object to the question as to form, and as being immaterial.

The COURT: He may answer. Objection overruled.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

The WITNESS:

A. Why, we could use any track in case there was a blockade to get back, or go the quickest way we saw fit, whenever there was a blockade, to use any track, any connection whatever.

Mr. MCSHANE:

339 Q. Coming down to the time of this accident, coming down to the question of your injury again, I believe I questioned you about the time you were at your home before you went away and you said you were laid up in November some time, is that right?

A. Yes.

Q. When did you go away?

Mr. EVERETT: I object to that; we were all over that yesterday, and the day he was away.

The COURT: It may be something new; he may answer.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel then and there duly excepted.

Mr. MCSHANE:

Q. When did you go away, Mr. Wagner?

A. December 15.

Q. Where did you go to?

Mr. EVERETT: I object; he went over that yesterday; it has all been covered, and this is repetition.

Mr. McSHANE: Oh, no.

Mr. EVERETT: This is detrimental to this company, to have the witness give his story twice.

The COURT: Objection overruled.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. McSHANE:

Q. Where did you go?

A. Well, the doctor recommended me to go to California.

Mr. EVERETT: I move that that be stricken out.

The COURT: The objection to that will be sustained, and the answer excluded from the consideration of the jury.

Mr. McSHANE:

340 Q. Where did you go, Mr. Wagner, where did you go first?

A. I went to Denver.

Q. What was your condition at that time, your physical condition?

A. Bad.

Q. In what way?

A. Why, I had severe pains in the back.

Mr. EVERETT: I object to that, he covered that yesterday.

Mr. McSHANE: No, he did not.

Mr. EVERETT: I have the notes of it.

Mr. McSHANE: The doctor may have said something about it.

Mr. EVERETT: No, the witness described it.

Mr. McSHANE: I want his condition there, and what he did there.

The COURT: As I remember, there was some talk about taking a stone from the bladder.

Mr. McSHANE: This is the fact, your Honor, he spoke of going away, and I asked him why he went, and so forth. I want to show how he was and what he did, who he saw and all about it while he was away. You are thinking about the doctor.

Mr. EVERETT: Here is what he said about it.

Mr. McSHANE: I know what he said.

The COURT: Let me see if there is anything to it; I want to give you all the advantage you are entitled to.

(Transcript of the proceedings taken yesterday, handed to the court for perusal.)

The COURT (indicating on the record): There is what happened before the 17th of December.

Mr. McSHANE: That is before he went away.

Q. When did you leave for Denver?

A. December 16th.

The COURT: You have it the 17th there (indicating on record).

341 Mr. MCSHANE: December 17th—well,——

Q. How long were you in Denver?
A. Until the 31st of January.
Q. Where were you while in Denver, where did you stop?
A. I stopped, I think the number is 1738 Pearl street.
Q. How did you get along while there?

Mr. EVERETT: I object.
Mr. MCSHANE: I certainly have a right.
Mr. EVERETT: How he got along while there?
Mr. MCSHANE: How he got along?
Mr. EVERETT: As to his physical condition?
Mr. MCSHANE: Yes, of course.
Mr. EVERETT: You didn't ask that.
The WITNESS: I was suffering severe cramps every night and could not sleep at all, and I was compelled to go to St. Joseph's Hospital before I left.

Mr. MCSHANE:

Q. How long were you in the hospital in Denver?
A. From January 21st to January the 31st.
Q. Whose car- were you under, if any one's?
A. Dr. Freeman.
Q. Did you consult any doctor while in Denver, except Dr. Freeman?
A. I applied to the Burlington Relief Department.
Q. Who was the doctor?
A. Dr. Kerwin.
Q. How soon after you arrived in Denver did you see him?
A. A day or two afterwards.
Q. How often did you see him before you went to the hospital?
A. I saw him once or twice.
Q. And while in the hospital, were you up and down, or what was the matter with you?

342 A. Well, I got up a little bit, but I was suffering severe pain in the back here (indicating), and right here, and in the hips, and cramps every evening.
Q. What did they do for you?
A. I had pills from Dr. Herman for the pain.
Q. What was done to your bladder, if anything, while there?
A. Why, they didn't do anything, just examined it.
Q. How was your ability to urinate, and whether it was free from pain, or painful, or how?

Mr. EVERETT: I object to the form of the question as leading; the witness ought to describe the feelings he had.
Mr. MCSHANE: I am directing his attention.
Mr. EVERETT: That is what I am objecting to.
The COURT: The form is bad.

Mr. McSHANE:

Q. Well, tell us all about it?

A. I had a burning sensation to urinate, pain from the bladder; urinate frequently, well, some times every few hours, some times hour and a half and so forth.

Q. When you left Denver, what was your condition at the time you left Denver?

A. Bad.

Q. In what way?

A. Well, I had severe pains in the back.

Q. How do you get about?

A. With a cane.

Q. How far could you walk at that time?

A. Probably about four or five blocks, six blocks without taking a rest.

Q. Where did you go from Denver?

A. San Diego.

Q. How long did you remain there?

A. Until the 30th of March, when I left there.

343 Q. Left there to come back home, the 30th of March left where?

A. Left San Diego.

Q. To return to Chicago?

A. To return to Denver.

Q. While you were in San Diego, what was your physical condition, and who did you see, if anybody, and what did you do?

A. Well, I was taking the Salt Water baths, hot, warm salt water baths, and massage.

Q. How often did you take them?

A. Most every day.

Q. Take any other medicine?

A. Well, I would take them pills whenever I got these severe pains.

Q. Did you see any doctor at San Diego?

A. No, sir.

Q. When you left there, where did you go?

A. I left and went to Los Angeles.

Q. How long did you remain there?

A. About eight days or so.

Q. What was your condition there?

A. The same.

Q. And where did you go from Los Angeles?

A. Arrow Head Springs.

Q. Where are the springs?

A. Why, seventy miles east of Los Angeles.

Q. How long did you remain there?

A. Four days.

Q. And what did you do there?

A. I took a mud bath there, a mud bath.

Q. Was the water drinking water?

A. No, it was mud they took out of the ground, the springs oozed from the ground.

Q. How often did you take those baths?

A. I took—I think I had two baths there.

344 Q. And then where did you go?

A. To Denver.

Q. When—do you remember when you got back to Denver?

A. The 17th of April—no, the 16th of April.

Q. That was what year?

A. 1909, no, 1910, rather.

Q. 1910?

A. Yes.

Q. And how long did you remain in Denver?

A. Until the 30th of May.

Q. How long was that from when—I didn't get that first?

A. April 16th.

Q. April 16th to May 30th?

A. Yes.

Q. Where were you in Denver?

A. Why, I stopped at Pennsylvania avenue.

Q. Were you in any hospital there?

A. No, I was stricken down there, and was about five or six days in bed at the place I was stopping at.

Q. Did you have a doctor?

A. No, sir.

Q. Did you consult a doctor at all the last time you were in Denver?

A. I remember about the 17th or 18th going to Dr. Kerwin, the Burlington Relief doctor.

Q. And then you returned to Chicago, is that right?

A. Yes, sir, about the 30th of May.

Q. The 30th of May last year, is that right?

A. Yes.

Q. About a year ago?

A. I went to Idaho Springs before that.

Q. After leaving Denver or before?

A. Before leaving Denver.

Q. How long did you remain at the springs?

A. Eight days.

Q. Drinking water, or taking the baths, or what?

A. I took a bath every day at Idaho Springs and massage

345 treatment from the attendant there.

Q. Did any one advise you to go there?

A. Yes, sir, Dr. Kerwin of the Burlington Relief.

Q. And then you returned to Chicago, did you?

A. Yes, sir.

Q. Where did you go when you came back to Chicago?

A. I reported in a day or two to Dr. Jack, the Burlington Relief doctor at Western Avenue, and then I went to Dr. Ehrmann.

Q. Have you told us all of the occasions that you have spoken of, about when you were stricken down until you got back to Chicago,

mainly, the one before you went away, and the one when you were in the hospital in Denver, and then when you got back to Denver. Were you stricken in Los Angeles, California?

A. Yes, I was in San Diego.

Q. How long were you laid up there?

A. Well, I had severe pains in the back, shooting pains down the legs, the cramps at night were not quite so severe.

Q. When you came back to Dr. Ehrmann and the other men, about a year ago, what was *down* for you from that time on?

A. I reported to Dr. Ehrmann about June 2nd, or so, and he has been irrigating the bladder ever since.

Q. Until when?

A. Until I should judge the 25th of March, or so.

Q. And what happened the 25th of March?

A. Well,——

Q. Where did you go, if you went any place?

A. They had a consultation, Dr. Ehrmann and Dr. Ryan.

Q. No, where did you go after the consultation, without reference to what they said?

A. The Alexian Brothers Hospital, April 2nd.

346 Q. Did anybody advise you to?

A. Dr. Ryan advised me to go to Milwaukee. He did not know they had a treatment at the Alexian Brothers Hospital.

Q. How long did you remain at the Alexian Brothers Hospital?

A. I am there at the present day.

Q. Before you went to the hospital—how often did the doctor irrigate your bladder?

A. Mostly every week.

Q. And during that time, were you up and about, or where were you?

A. Yes, I was around all summer mostly, but I get so dizzy and exhausted, I would have to rest after walking six or seven blocks; I have pressure here, and pressure on the head.

Q. Pressure where?

A. On the back, heavy pressure, and pains.

Q. Have you had any of these spells lately?

A. Yes.

Q. How many of them?

A. Two.

Q. How long were you laid up with each, at one time?

A. About eight days.

Q. During the eight days, where were you?

A. 2340 Lawndale avenue.

Q. No, were you up or in bed, or where?

A. In bed two days.

Q. On the two occasions?

A. Yes, I called the Doctor, Dr. Ehrmann for relief.

Q. Did you have any other attention besides that given by Ehrmann during that time, anything else done for you besides irrigating the bladder?

A. Well, I was massaged mostly with alcohol rubs morning and evening.

347 Q. How often did you do that?

A. Every day, morning and evening.

Q. When you went to the hospital in March, what was done for you, and in whose care were you under there, if anybody's?

A. Dr. Hime's.

Q. Who is doctor Hime?

A. A nerve specialist.

Q. How often has he seen you?

A. He gives me electric treatment every day and massageing.

Q. You took electric baths, you say?

A. Yes, sir.

Q. How many?

A. Every day.

Q. In water, or how?

A. In water.

Q. Was anything else done for you?

A. After that I get it rubbed in with some solution of some kind; I don't know what it is; some salve or something, and massaged from head to foot.

Q. How is your bladder?

A. Well, I still have the burning sensation.

Q. What about the frequency with which you urinate?

A. Well, sometimes I have the burning oftener than at others. Sometimes I can hold the water two hours, sometimes three hours.

Q. What is your ability to get about; how far can you walk; how much can you do in the way of exertion?

A. If I walk about eight blocks or so I get too exhausted and dizzy.

Q. Well, does it make any difference to you whether walking upstairs, downstairs or on the level?

A. Yes, sir, more so in walking upstairs.

Q. Has your sexual desires been affected in any way since this accident?

A. Yes, sir, ever since I have been injured.

Q. What do you mean by that, been improved?

A. I have no desire, no desire to intercourse.

348 Q. Was there any trouble with you in that regard before the accident?

A. No sir.

Q. Do you feel you are getting any better in your walking, Mr. Wagner?

Mr. EVERETT: I object to the form of the question.

The COURT: Yes.

Mr. EVERETT: Let him describe.

Mr. MCSHANE:

Q. Describe whether any ability in your walking, or ability to get about?

Mr. EVERETT: I object to that. The witness ought to state his entire present condition first. He knows it, and counsel ought not to direct.

The COURT: The objection will be sustained. You should let him tell about it himself.

Mr. MCSHANE: Go ahead and tell about your condition now as compared with the past?

Mr. EVERETT: Anything that he has not heretofore stated.

Mr. MCSHANE:

Q. About your walking?

A. Well, I get heavy pressure here in the back; I have that when I walk to any extent.

Q. What place in the back?

A. Right here in the lower part of the spine; about there (indicating).

Q. Now how long altogether have you had that pain there? When did it commence?

A. Ever since the injury.

Q. And how about your limbs?

A. Why, the hips get shooting pains through the hips. I get all exhausted and dizzy, and I have to sit down and take a rest after walking about eight blocks, or six to eight blocks.

349 Q. What improvement, if anything, have you noticed about your ability to walk?

A. Well, I can walk a little better in the summer time.

Q. A little better in the summer time that what?

A. Than in the winter.

Q. Well, on the whole, what I want to know is, is there any change now, as to whether you are able to walk better, very much better, very little better, or about the same, or how?

Mr. EVERETT: I object to the form.

Mr. MCSHANE: I want to know.

Mr. EVERETT: I know it, but the witness can tell us the condition.

Mr. MCSHANE: I am directing his attention now to that one question: whether he noticed any change.

Mr. EVERETT: That is not your question.

The COURT: Objection overruled.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. Go ahead.

A. I haven't increased any in strength at all.

Q. As to your ability to walk? Is that the same?

A. Yes, sir.

Q. How tall are you, Mr. Wagner?

A. About five feet, five inches.

Q. When do you have that so-called dizziness? With what frequency?

A. At different times during the day, and more so after walking.

Q. How are your nerves?

A. I get all exhausted after walking, dizzy and excited. I have to sit down or lie down and rest.

350 Q. How is your nervous condition in a general way?

A. Weak and shaky.

Q. Do you notice any difference as to your sight?

Mr. EVERETT: I object. The witness should be allowed to state.

Mr. MCSHANE: I am directing his attention to the subject.

Mr. EVERETT: I am objecting to the question.

Mr. MCSHANE:

Q. Is there anything else you can tell us about your nervous condition besides what you have already told us?

A. Yes, my eyes are very weak; very weak since this accident, and they have "gone in the head" about one-quarter of an inch; since the injury; sunk in the head.

Q. Mr. Wagner, have you told us all about your condition in a general way. Is there anything else you case to tell us?

A. Well, before going to the hospital I could not sleep on this right side at all any more than about two hours or so, and then wake up with a shock or a cramp in the left arm.

Q. How long has that been so?

A. On and off since the injury.

Q. Is there any improvement now in that regard?

A. A little improvement since taking care of the body.

Q. What was your health before the accident?

A. I didn't finish that yet.

Q. Go ahead.

A. Lying on my back there is a heavy pressure there at the lower end of the spine, and then I get pressure in the head, and over the forehead here, and I wake up, and can't go to sleep at all lying on my back, and on the right side I get palpitation about the heart; I sleep probably an hour and a half on the left side.

Q. How long has that been so?

A. More so this winter.

351 Q. Anything else now?

A. I think I stated, I guess, about the walking and the pressure in the back.

Q. You have told us that?

A. Extending into the hips. The back gets awful weak, and I get very dizzy and excited, after walking.

Q. What have you observed, if anything, with reference to irritability or the lack of it?

Mr. EVERETT: I object to that; he testified to that.

The COURT: He may answer.

Mr. EVERETT: Exception.

To which ruling of the court the defendant by its counsel then and there duly excepted.

The WITNESS: I don't just understand.

Mr. McSHANE:

Q. Whether you are irritable or not?
A. Irritable?
Q. Yes?
A. In pain?
Q. Well, whether easily excited?
A. Yes, I am easily excited, and I don't go out in the evening at all, because my step is not safe.
Q. Can you get along without a cane?
A. No sir.
Q. Were you lame before the accident?
A. No sir.
Q. Anything the matter with your gait at all?
A. No sir.
Q. Are you lame now?
A. Yes, sir.
Q. Have you earned any money since the accident?
A. No sir.
Q. Before the accident did you work only occasionally or steadily?
A. Steady.

Mr. McSHANE: I guess that is all.

351½ Cross-examination.

By Mr. EVERETT:

Q. Are you the Joseph M. Wagner who was the plaintiff in a case pending in the Circuit Court of Cook County number 203,655 in which Joseph M. Wagner is plaintiff and the Chicago, Burlington & Quincy Railroad, and the Chicago & Western Indiana Railroad Company, the Illinois Central Railroad Company, and the Atchison, Topeka & Santa Fe Railroad Company are defendants?

Mr. McSHANE: I will admit that he is, and admit all the files in that case in evidence in this case, if you want to.

Mr. EVERETT: All right, sir.

Mr. McSHANE: They go in.

Mr. EVERETT: Then we offer all the files in that particular case, including the declaration, pleas and summons, and all the others.

Mr. McSHANE: All the others.

Mr. EVERETT: You admit them?

Mr. McSHANE: Yes, I don't know that he knows it, but he is.

Mr. EVERETT: I ask that the files be marked Defendant's Exhibit 1 for identification.

(Papers in question so marked.)

Mr. McSHANE: If they are not all there, I will put them there.

Mr. EVERETT: They are all here, I guess.

Q. Look at these various checks and answer whether or not those are your signatures on them.

Mr. McSHANE: I object to it, if the court please, as not cross examination. I know perfectly well what this is and I am perfectly willing to meet it. It is a matter of defense. He belonged to the Relief Department of this road.

352 Mr. EVERETT: I am objecting to counsel stating that. I am asking if that is his signature.

Mr. McSHANE: I object as not cross examination.

The COURT: I think he can identify the papers.

Mr. McSHANE: We will have no trouble about it. I am willing to meet it. It is not cross examination and simply a matter of defense.

The COURT: I understand, but you can ask him about his signature.

Mr. McSHANE: All right.

The COURT: That is all the examination can be extended to, is whether or not that is his signature.

(Witness examines checks.)

Mr. McSHANE: Any of the checks that has his signature on it, I will admit to be his signature and as genuine. If you point it out, all right, but I haven't any idea but what they are all genuine.

Mr. EVERETT: He has pretty near finished now.

The WITNESS: I don't know what they are in there (indicating).

Mr. EVERETT:

Q. I am asking if these are not your signatures, that is what I am asking.

A. Yes, these are my signatures.

Q. Those are your signatures?

A. Yes.

Mr. EVERETT: 29 checks, and I ask they be marked for identification number 2 to 31 inclusive.

(Exhibits in question so marked.)

Mr. McSHANE: We will agree on that.

Mr. EVERETT:

Q. Is that your signature?

Mr. McSHANE: I am making the same objection. This has all got to do with the Relief Department and I object to it.

The COURT: Yes, what the paper is, but nothing else pertaining to it may be inquired about, he may identify the signature, and that is all.

353 Mr. McSHANE: Go ahead.

The WITNESS:

A. That is my signature, yes.

Mr. EVERETT: I ask that the document be marked Defendant's Exhibit 32 for identification.

(Said document so marked.)

Q. Is this your signature (showing witness paper), you need not read the whole thing, is that your signature?

A. Yes sir.

Mr. EVERETT: I ask that be marked Defendant's Exhibit 33 for identification.

(Document in question so marked.)

Q. No, no, is this your signature on this double paged paper here (indicating), and here (indicating) (showing witness).

A. Yes, that is my signature.

Mr. EVERETT: I ask that be marked for identification Defendant's Exhibit 34 for identification.

(Document in question so marked.)

Q. Is that your signature, here is your signature right here (indicating and showing witness)?

A. Yes sir.

Q. You signed that on January 5th, 1909, did you?

A. Well, I am not positive about that.

Q. Was it about that time?

A. It may be about that time.

Q. How?

A. Maybe about that time.

Mr. EVERETT: I ask that this be marked Defendant's Exhibit 35 for identification.

(Document in question so marked.)

Q. This document that you attached your signature to, which has been identified as Defendant's Exhibit 35 was a statement of
354 the occurrence, the happening of this accident, wasn't it?

Mr. MCSHANE: I object to that, your Honor, the document shows for itself.

The COURT: Objection sustained.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. EVERETT:

Q. You understood that question, didn't you?

The COURT: Objection sustained.

Mr. EVERETT: Exception to the ruling.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. EVERETT: I have a right to show that the witness knew what he was signing. The purpose is to impeach him on his former testimony.

The COURT: It may go in, if that is what you are using it for. But you must tell me what it is you want.

Mr. EVERETT:

Q. When you entered the employ of the railroad they gave you a Book of Rules, didn't they?

Mr. McSHANE: I object to that, your Honor.
The COURT: Objection sustained.
Mr. EVERETT: Exception.
To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Q. I show you a document purporting to be the rules of the operating department and ask you if you have ever seen that before?

355 Mr. McSHANE: Mr. Everett, has that got to do with the Relief Department?
Mr. EVERETT: No.
Mr. McSHANE: Something else altogether?
Mr. EVERETT: Something else altogether.
Mr. McSHANE: Then I don't object to it if it has not the relief feature.
Mr. EVERETT: It has the operating feature.
Mr. McSHANE: I don't object to it.
The COURT: It may go in.
Mr. EVERETT: I said the Book of Rules.
Mr. McSHANE: They don't contain anything about relief.
Mr. EVERETT: Not a thing.
Mr. McSHANE: All right.

Mr. EVERETT:

Q. Were you not given a printed book similar to that when you entered the employ of the Burlington railroad or when you became a switchman for that railroad, and is this not a copy of the book, a printed copy?
A. I don't remember getting a book of rules like this.
Q. Did you get a book of rules for the operating department?
A. I don't remember.
Q. Will you say that you did not?
A. I won't say that.
Q. Before you became a switchman, didn't you have to stand an examination from the Book of Rules before you were admitted as a switchman?
A. No sir.
Q. You were a member of the Relief Department of the Burlington Railroad, were you not?

Mr. McSHANE: I object to that, your Honor.
The COURT: What is the object of it?
Mr. EVERETT: Identifying him as a person.
Mr. McSHANE: Well, I admit that he was a member of the
356 Relief Department.
The COURT: All right.

Mr. EVERETT:

Q. How old are you at the present time?
A. 38.
Q. About 35 at the time of your accident?
A. About that.
Q. 36. You are not a married man?
A. No sir.
Q. Never have been married?
A. No sir.
Mr. MCSHANE: Keep your voice up.
A. No sir.

Mr. EVERETT:

Q. You have been 22 years in the service of the Burlington railroad, haven't you?
A. About that time.
Q. And during that time you have served in a number of different capacities, have you not?
A. Yes sir.
Q. Been yard clerk, haven't you?
A. Yes sir.
Q. What was the first employment you took there?
A. Taking the number of cars at night at Wood street.
Q. How long have you been a switchman?
A. About five years.
Q. Five years before your accident?
A. About.
Q. You never worked for any other company than the Burlington as a switchman, did you?
A. No sir.
Q. Your work during all the time for the Burlington was always confined to the locality in and about Chicago, wasn't it, or were you ever on the road?
A. Yes, I was on a local train once between Chicago and Aurora.
357 Q. How long did you run on that train?
A. Oh, about three or four days to the best of my recollection.
Q. Other than that, you have been a member of a switching or interchange crew, have you?
A. Yes.
Q. Passed over almost all of the railroad tracks in and around Chicago, that is a fact, isn't it?
A. Not at all, no sir.
Q. Most of them.
A. No, not most all of them.
Q. You have been what they call a head switchman, haven't you?
A. I have been what they call conductor or man in charge of the engine.
Q. Weren't you ever the man following the engine?

A. Yes sir.
Q. The rear man?
A. Yes sir.
Q. Worked in all the positions that a switching crew has, haven't you?
A. Yes sir.
Q. And finally worked up to be conductor or foreman of the crew?
A. Yes sir.
Q. And at the time of this accident you were acting as foreman and had the charge of the *charge of the* crew and the movements of the train?
A. Yes sir.
Q. The engineer was under you so far as the movements of the train were concerned you gave him directions when and where to go?
A. Yes sir.

Q. The day of this accident you went to work about seven
358 o'clock in the morning?
A. Seven o'clock, yes sir.
Q. When did you report?
A. About five minutes to seven.
Q. To whom did you report?
A. Patty Riley, the yardmaster at Western Avenue.
Q. Then you went to your engine where the other members of your crew were, did you?
A. He gave me a message to protect this silk, five cars of silk and told me to get them over there as quickly as possible. The cars were badly delayed.
Q. Patty Riley said that?
A. Yes sir.
Q. At seven o'clock in the morning?
A. Five minutes to seven.
Q. Did he tell you where to go and get the silk?
A. Yes sir.
Q. Where did he say?
A. He said, "go down to the passenger yard." He said "you go down and protect that silk and get it over there the quickest way I could."
Q. That is all that he said?
A. Yes sir, that I know of.
Q. Every word he said that you remember?
A. That I remember of, yes.
Q. How did you know where to go and get the silk?
A. I know where they always brought it in and always it came in on the passenger trains usually.
Q. How?
A. It come in on passenger train, all that I ever handled.
Q. So you went then to the Harrison street yards with your engine and your crew?
A. I went to the 14th street passenger yards.

Q. Did you get all of the cars there?
359 A. Three cars were there.
Q. Were they set out on the side track?

A. No, they were at the head end of the regular passenger train, the Minneapolis passenger train.

Q. And you picked up the three cars, did you?

A. Yes sir.

Q. And took the three cars then from the 14th street yards to Harrison street, did you?

A. I took them to Harrison street, yes.

Q. Did you have to get off the Burlington for the purpose of getting to Harrison street.

A. I had to go on the Fort Wayne tracks to 12th street, and in the Burlington yards at 12th street.

Q. And then the movement of the switches is regulated by semaphores, is it not?

A. By hand signals.

Q. Hand signals to the men operating the semaphores?

A. There were no semaphores there.

Q. You gave the hand signals, did you?

A. Why, the switch tender gives the hand signals to go up.

Q. When you left 14th street you traveled on the engine, did you?

A. Yes, I was on the engine.

Q. And you had a man on the front end of the train?

A. Well, I don't just remember now; they were on the three cars, they were on the train. Now I don't just remember the position they were in.

Q. You were required to have a man on the front car as you went ahead, weren't you?

A. Yes.

360 Q. You were?

A. Yes.

Q. You pushed your train ahead of you, didn't you?

A. That I don't remember whether we pulled them to Harrison street, or pushed them.

Q. Then you picked up the two cars at Harrison street, didn't you?

A. No sir, I picked them up at 16th street. We took them off the St. Paul and Minneapolis passenger train there.

Q. Then you had five cars after you picked up the two at 16th street?

A. Yes sir.

Q. Then did you go over to the Harrison street yards?

A. Yes sir.

Q. For what purpose?

A. Well, I put one of these cars with the other three, and took one car to the Harrison street platform to take out a shipment of silk for the Grand Trunk.

Q. And then you took that car back and made up your train of five cars again, did you, after it was unloaded?

A. After they took the silk out we coupled up our air and went.

Q. Now, when was it you made this list of the number of the cars, this list marked Plaintiff's Exhibit H?

A. I took three of them when I was in the passenger yard, the first three, and the other two I took right before we left.

Q. Now, as you proceeded from the Harrison street yards, the cars were in the order that they appear on the list here. Great Northern 1617, 1664 was the second, 1650 the third, and so forth, isn't that true?

361 A. No, I don't think that was true.

Q. Do you know how they were arranged according to the numbers?

A. No, I do not.

Q. Those five cars were all alike, weren't they?

A. One was smaller than the others.

Q. Which was the smaller one?

A. I think 1017, but I am not sure as to that number on there.

Q. No, there is 1003 on there?

A. That one was a little smaller.

Q. You were never on 1003?

A. No sir, that is the smaller in length.

Q. But in width, they were about the same?

A. About the same.

Q. All baggage cars are about the same in width, are they not?

A. I think they are the same width.

Q. So that when you make up the train they would have the same clearance as other cars beside them on the tracks, wouldn't they?

A. Some might be a little—I think they were about the same.

Q. The car you were on at the time you were hurt was a regular sized car, was it not?

A. Yes.

Q. And had a clearance with objects adjacent to the track that an ordinary baggage car of that kind would have?

A. I don't understand that.

Mr. McSHANE: Wait.

Mr. EVERETT:

Q. It was usual in that respect?

A. I don't understand that.

362 Mr. McSHANE: The clearance would depend on where the objects were at the time.

Mr. EVERETT:

Q. As you proceeded—you didn't talk to anyone else about the shipment except Riley, O'Reilly, did you?

A. Yes, the superintendent's office called me up.

Q. Where did they reach you?

A. The number taker came out of the little telephone——

Q. I said, where did they reach you?

A. At Harrisoon street.

Q. So that when you had your train completed——

A. They were taking, I think, the silks.

Q. Then you were told by the superintendent's office what?

A. To take them over the quickest way, that the cars had been badly delayed.
Q. That is all they said to you?
A. That is all that I can remember.
Q. When they told you to take them the quickest way, you knew the quickest way, did you?
A. What is that?
Q. You knew the quickest way to get from the Harrison street yard to the Erie street yard at 51st street, did you?
A. Yes, sir.
Q. There were two ways of getting to the Erie street yard, your destination from the Harrison street yard, were there not?
A. Yes, sir.
Q. One over the Air Line?
A. Yes, sir.
Q. One over this Grove street connection?
A. Yes, sir.
Q. You knew that, didn't you?
A. Yes, sir.
Q. You called at the superintendent's office of the Burlington within the last two or three days, didn't you?
A. Called there?
363 Q. Yes.
A. No, sir.
Q. Have you in the last two or three weeks?
A. No, sir.
Q. Do you know Mr. Feeney down there?
A. I know him.
Q. Didn't you go down to him and say: "Feeney, you are the man who telephoned me to take these cars over there the quickest way," or in substance those words?
A. No, sir.
Q. You didn't talk to Feeney at all about it, since you have begun this lawsuit?
(No response.)
Q. Didn't Feeney tell you——

Mr. McSHANE: Wait a minute, are you through with that? Let him answer.

Mr. EVERETT: Had you talked to Feeney about that subject since this lawsuit was begun?
A. I had a few words with him.
Q. When was that?
A. I cannot just recall that.
Q. About when was that?
A. Well, it might have been a month ago or so.
Q. About a month ago. At that time, you expected this case to be reached, didn't you?
A. Yes, sir.
Q. And didn't you say to Feeney, in substance, "Feeney you told me, you are the man who told me to take those cars around the shortest way?"

A. No, sir.
Q. Didn't he reply to you: "No, I never said any such thing."

Mr. McSHANE: Wait a minute, there is nothing contradictory there. He did not say he knew who the man was.
364 Mr. EVERETT: I object to that statement.
The COURT: He may answer that.
Mr. McSHANE: He may have supposed——
Mr. EVERETT: Just a minute, I object to counsel, when the court has ruled here, making a supposition that the witness hears.
The COURT: Objection sustained.

Mr. EVERETT:

Q. Do you understand the question?
A. No, I don't understand.

Mr. EVERETT: Read the question.

(Question read.)

A. I never told him.
Q. Never said that?
A. No, sir.
Q. Feeney never said any such thing to you, did he, on that occasion?
A. You mean the day I took the cars over?
Q. I will withdraw the question. *Q.* Did you discuss at the time that you saw Feeney, about a month ago, the question as to who told you to take the cars over.
A. We had a few words.
Q. About that subject was it?
A. Yes.
Q. You went there for the purpose of finding out, or to get Feeney to testify that he was the man that told you, isn't that so?
A. I did not go there at all, no, sir, not for that purpose, no, sir, I was not over there at all.
Q. Didn't you just say you were over there about a month ago?
A. No, I didn't say I was over there; I saw him about a month ago.
Q. Where did you see him?
A. Why, I think it was in McShane's office.
365 Q. Did this conversation occur at McShane's office?
A. Yes, sir.
Q. And Feeney was there, was he?
A. Yes, sir.
Q. Had you asked him to come there?
A. No, sir.
Q. Who had asked him, do you know?
A. I do not know, no, sir.
Q. At that time, was he not asked by some one present, if he was not the man who gave you the directions, and did he not say "No", he was not?
A. I do not remember that.

Q. How did you know that across the Grove street track was the shortest way to get to the Erie yard?

A. Well, I knew after you got on the main tracks of the Fort Wayne, passenger tracks, that they have to get you right off of there, that they could not hold you.

Q. How did you know——

A. If you would go over the Air Line——

Q. How did you know that you could get from the Fort Wayne on to the Western Indiana track?

A. Well, I happened to pass there four or five years previous to that, and I saw the "Y".

Q. And you remembered it four or five years?

A. I knew there was a "Y" there, yes.

Q. You remember that for four or five years?

A. Yes.

Q. You had not been there during that four or five years?

A. Not over that track, no, sir.

Q. What?

A. I never was over the track before.

366 Mr. EVERETT: I move that that be stricken out as not responsive to any question: "I never was over that track before," I didn't ask that.

Mr. MCSHANE: I don't care about that.

The COURT: Yes, that may be stricken. That was not asked of the witness.

Mr. EVERETT:

Q. You had always gone over the Air Line before this occasion, had you, in making the connection, the delivery from Harrison street to the Erie?

A. Going over the Air Line, whenever we would go to 14th street.

Q. How many times a day had you gone over the Air Line?

A. Oh, I would not go over it probably once in a week.

Q. And you had been taking silk and other perishable freight over the Air Line, for five years before this time, had you?

A. No, sir.

Q. How had you taken it?

A. I never took any over the Air Line. I never took any over the Air Line; what I mean to say is that they were usually fish for the Erie, and that went down to the passenger depot.

Q. Where was their depot?

A. About Polk street.

Q. Well, that did not require you to go across 16th street or the Air Line?

A. Well, just about on the connection.

Q. Did you take the fish over the Air Line?

A. Yes.

Q. How often did you do that?

A. Oh, about once or twice.

Q. Once or twice—how often?

Mr. McSHANE: I object to that, your Honor, as utterly immaterial.

367 Mr. EVERETT:

Q. Altogether do you mean?
A. Yes, sir.

Mr. McSHANE: That is utterly unimportant—well, he has answered—go ahead.

Mr. EVERETT:

Q. How often have you made deliveries to the 51st street yard—ever deliver there during your experience.

—. ——.

Q. Twice before this occasion?
A. Once.
Q. At that time, you went over the Air Line?
A. Yes.
Q. Now, as you came down the Fort Wayne tracks, from the Harrison street yard, you rode in the engine, in the cab?
A. No, I was on the footboard, on the tank of the engine.
Q. Front or rear?
A. That was the front end of the engine; the engine was backing up, going south.
Q. You were to the south then?
A. South, yes, the engine was headed north.
Q. The tender was between you and the car?
A. No, sir.
Q. I mean the tender was on the front end, as the engine proceeded? You had the cars to the north of you, hadn't you?
A. Yes, sir.
Q. Now, Coleman, the brakeman was on the first car, wasn't he?
A. He was on the last car.
Q. Well, that is the first car going, wasn't it?
A. North.
Q. It was the north car?
A. The north car, yes, sir.
Q. It was the first car that would approach any object, wouldn't it, going north?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.
368 Q. Is that right?
A. Yes, sir.
Q. And he had the air hose, with an air connection attached, didn't he?
A. Yes.
Q. That was for the purpose of signaling the engineer, wasn't it?
A. For the purpose of setting the air.
Q. Setting the air, and that signaled the engineer?
A. It don't signal the engineer.

Q. But doesn't the engineer know when to stop his train, or regulate his speed by the pressure of the air?

A. Why, the man on the hind end, or Coleman, when he applied the air, he can slow it down, it is all owing to what application he makes—or stop it.

Q. Well, if he throws on all the air, that merely throws on the air on the brakes, doesn't it?

A. Yes, sir, on the engine, too.

Q. And the engineer recognizes it by the resistance it makes, isn't that so?

A. Yes, sir.

Q. Then he shuts off his steam, doesn't he?

A. Yes, I suppose he does.

Q. So in that way, he was to signal the engineer, wasn't he?

Mr. McSHANE: I object to that.

A. He was not to signal the engineer at all.

The COURT: Wait a minute; the objection is sustained; that is a matter of conclusion.

Mr. EVERETT:

Q. As you proceeded from Harrison street north on the Fort Wayne tracks, the engineer was back to the south of the cars, wasn't he——

A. Repeat that question.

369 Mr. EVERETT: Read it to him.
(Question read.)

Mr. EVERETT:

Q. (Continuing:) South of the baggage cars?

A. We were not going north from Harrison street.

Q. Which way did you go?

A. South.

Q. Well, then, as you went south on the Fort Wayne track, the cars were ahead of you, weren't they—or was the engine first?

A. The tank of the engine was first, then come the engine.

Q. Yes.

A. Then the five cars.

Q. I see. How far south did you proceed from 14th?

A. About—to about Archer avenue with the engine.

Q. Then you started and went north, did you?

A. Yes, sir.

Q. And switched over on to another track, was that your way?

A. Well, the switch tender let us across from the south bound main track to the north bound main track of the Fort Wayne, and we stopped, probably half a minute, and there was a semaphore right there that governed that "Y". There is a lower arm on it and an upper arm; the upper arm governs the Fort Wayne main track; the lower arm governs the "Y", and we got the lower arm, and we went around.

Q. And that put you on the north bound Fort Wayne main track?
A. No, sir, put us on the "Y".
Q. Well, you went from that finally on to the northbound main track of the Fort Wayne, didn't you?
A. No, sir, we went on to the "Y".
Q. That is to where?
A. What is that?
Q. Where did you go on the "Y"?
A. Well, went as far as that semaphore post that I was
370 crushed there with, then we stopped there.
Q. That is away down to Grove street, isn't it?
A. That is, I should——
Q. I have been trying to get the way that you got out of the Harrison street yard.

Mr. McSHANE: He has told you that he went south on the Pennsylvania, and this place that they reversed was about Archer Avenue.

The COURT: They jury heard what he said. Proceed.

Mr. EVERETT:

Q. Where is the place where you were hurt, north or south of Harrison street?
A. South.
Q. How far south?
A. About a mile and a half.
Q. Weren't you going east at the time you were brushed off of the train?
A. We were going north I know, might possibly have been a little northeast.
Q. That is right. Now, when you left the Harrison street yard, you went south, didn't you?
A. Left Harrison street yard and went south?
Q. Left Harrison street yard and went south?
A. Yes.
Q. Now, where was it that you turned and started to go north again?
A. We did not turn.
Q. Well, when you stopped and started north, where was that?
A. We shoved them cars,—we pulled across the connection as I told you before.

Mr. McSHANE: He said they went south, down to that point, and then backed over on the "Y", northeast or north to where the accident happened.

371 Mr. EVERETT: I know what he said; I was not asking you for any information.

Mr. EVERETT:

Q. Just before you got to this "Y" regulating this curved track—you are calling this curved track a "Y" now, are you; the track upon which you were at the time you were hurt, you are calling that a "Y"?

A. I would call it a "Y," yes.
Q. It is only a "Y," because it makes the connection with the Pennsylvania and the Western Indiana track, isn't that it?

Mr. McSHANE: I object to that, if the court please, that is just a name for the connection, and whether it is a right name or a wrong name, I object to it, as it is a conclusion as to what it is.
Mr. EVERETT: I want to know why he called it a "Y."
The COURT: Proceed with the examination.

Mr. EVERETT: You came out on this bridge, shown on the picture, "Defendant's Exhibit C," didn't you, just before you came to this place?
A. Let me see it just a minute.

(Photograph handed witness.)

A. We crossed that bridge, yes.
Q. And you crossed, and you went by the semaphore marked "1" on "Exhibit C," didn't you?
A. Yes, sir.
Q. Do you know what the clearance is of that bridge, between the sides of those baggage cars and the bridge?

Mr. McSHANE: I object to that, your Honor, the bridge clearance has nothing to do with this case.
Mr. EVERETT: It has a good deal to do with it. There is an obstruction immediately before he got to the track where this accident occurred——
372 The COURT: What bearing has it?
Mr. EVERETT: There is an obstruction immediately before he got to this track, where the accident occurred, and he testified yesterday about other obstructions in answer to Mr. McShane's questions.
Mr. McSHANE: Well, if you think there is any point, go ahead, but I do not think it is competent.
Mr. EVERETT: Well, either stick to your objection, or——
Mr. McSHANE: I will withdraw it. I am not trying to get error in here, I am trying to keep it out, if I can.

Mr. EVERETT:

Q. Do you know what the clearance is at the side of the bridge, between the side of the bridge and those baggage cars you were carrying?
A. I do not, know, because that was on the other side. This is not the semaphore I was talking about (indicating).
Q. I am talking about the bridge—the bridge has two sides, hasn't it?
A. Yes, sir.
Q. Now, which is that, the south side of the bridge—that is the west side, isn't it (indicating)?
A. Yes.
Q. The left hand side of the bridge, as you look at it in the picture?

A. This is not the south side of the bridge, it is the end.
Q. Yes, the end nearest to you as you look at it?
A. Yes, that is the south side of the bridge.
Q. And the left hand side is the west side, isn't it?
A. Yes, sir.
Q. Now, what is the distance between the upright of that bridge, on the south side, the distance between that and the baggage car, the sides of the baggage car?
373 A. I could not tell you.
Q. Isn't it a fact it was not over six inches, isn't that a fact?
A. I could not tell you anything about it.
Q. Isn't it a fact that that next semaphore, right outside of that bridge is only 18 inches away from the track?
A. I could not tell you that.
Q. You passed over that track didn't you?
A. Yes, sir.
Q. And was on this side (indicating)?
A. That was on the other side. That semaphore was on that side (indicating), and I was on this side (indicating), on the right hand side, the engineer's side.
Q. Which way did you go on to the bridge, did you come from the south or the north?
A. We were going south.
Q. You were on the right hand side of the track, weren't you?
A. Left hand side—well let us see—we were on the southbound track.
Q. Yes, that is the west track?
A. West track.
Q. Yes, and that semaphore is on the west side of the southbound track, isn't it?
A. Yes, sir.
Q. So is the side of the bridge, on the west side of the southbound track, isn't it?
A. The bridge?
Q. Yes, the uprights on that bridge?
A. The south side of the track?
Mr. McSHANE: The track runs north and south.
A. I don't understand that.
Mr. EVERETT: On the west, on the west side of the south-
374 bound track. Now, after you went by this semaphore, marked "1," were there any other semaphores between that one and the one that you were brushed off on?
A. Well, that semaphore was on the track we were going south on. We were going north when I was brushed off, on the northbound track, going around the "Y." I was not on that track at all.
Q. When you came to the bridge, which track were you on?
A. The west track.
Q. You were on the Pennsylvania Railroad company track, weren't you?
A. On the main passenger track.

Q. And you were going south?
A. Yes, sir.
Q. With your engine first, and the cars behind you, cars to the north?
A. The cars to the north, the tank of the engine first and then the engine and then the five cars.
Q. Then you stopped to get a switch, didn't you?
A. I went over that once.
Q. Let us go over that again.
A. All right.
Q. You stopped to get a switch, didn't you?
A. Why, we pulled up as far as Archer avenue with the engine.
Q. You will get along faster if you will answer the question?
A. The switch tender let us across from the southbound Fort Wayne main track on to the north bound main track.
Q. Yes.
A. And there was a semaphore there governing the—with a double arm on it.
Q. Yes, we have heard that. Now, how close was that semaphore to the track?
A. Why, it was about 5 or 6 feet away from the track.
375 Q. And then you proceeded on to this curved track that you were struck on, didn't you?
A. Yes, sir.
Q. Prior to that time, you had ridden on the engine, footboard of the engine?
A. Up to the cross-over.
Q. Up to that time?
A. Up to the cross-over.
Q. Yes. Then when you got the signal to go ahead, you climbed on to the side of the baggage car, did you?
A. Yes, sir.
Q. The second car from the front?
A. No, sir.
Q. Well, this time you were going north, weren't you, northeast?
A. Yes, sir.
Q. And the cars were ahead of the engine?
A. Yes, sir.
Q. You got on the second car from the front end, going north?
A. No, sir.
Q. What do you call that, the rear end?
A. I got on the first car going north, the first one, about 15 feet from the door, or the end of the car.
Q. That was the same car that Coleman was on, was it?
A. Yes, sir.
Q. Now, you stood on the truss, did you, with your feet?
A. No, there was a ladder step the full length of the door, underneath the door sill, made of iron.
Q. Underneath the car?
A. Yes, sir.
Q. How many steps did it have?

A. One that I know of.
Q. Now, are you sure of that?
A. Well, I say one that I know of.
376 Q. Are you sure that car had a step, extending underneath that car, hanging down.
A. Yes, sir.
Q. Will you swear the car did not have the construction shown on that blue print, with a truss there, and no step at all?

(Counsel hands blue print to witness.)

A. Yes, sir.
Q. You will swear that is not a correct——
A. No, the door was about 15 feet from the end of the car. It might have been a few feet either way.
Q. Yes. You were on car 1664, weren't you?
A. I was on the first car that we were shoving north around the "Y."
Q. Wasn't that car 1664?
A. I couldn't tell you that.
Q. Did you see the front end of that car?
A. Yes, sir.
Q. Isn't that a correct representation of it?
A. No, sir.
Q. You are positive of that?
A. Yes, sir, at that time.
Q. What?
A. Yes, sir, at that time.
Q. But the front end of that car did have a brake wheel?
A. Yes, sir.
Q. And it did have a ledge of from six to eight inches?
A. It had a grab-iron of about fourteen inches long on the end sill of the car.
Q. Well, that sill was about six or eight inches, wasn't it?

Mr. McSHANE: Which way do you mean?
Mr. EVERETT: In width, north and south, at the time you were going along?

A. The sill was flush with the car.
377 Q. Didn't that sill extend out at all?
A. No, sir.
Q. Did you ever see a car in your life, without any sill, a baggage car of that kind?
A. They have got sills, but they don't stick out, not all of them.
Q. Where are the sills?
A. Some do, and some don't.
Q. Where are the sills?
A. The sills are under the boarding of the car, underneath the boarding of the car.
Q. Did that car have a front door on it, a door on the end of the car?

Mr. McSHANE: I object to it, your Honor, it is not important, it is not cross examination.

The COURT: I don't know about that. Overruled.

Mr. EVERETT:

Q. Didn't that car have a door on the front end of it?

A. I am not sure about that.

Q. What?

A. I am not sure about that, I don't know.

Q. Didn't that car have a stirrup in the front, in addition to a hand-hold?

A. What kind of a stirrup do you mean?

Q. I mean an iron step that hangs down.

A. No, sir, it did not.

Q. For a switchman to stand on or get on, when he gets on a moving car?

A. It did not.

Q. You are positive of that?

A. Yes, sir.

Q. Did you see Coleman stand on the front of that car?

A. Yes, sir.

Q. Did he have both feet on the grab-iron, or only one?

A. Well, I don't know. I know that he was standing on the grab-iron, but I don't know whether he had both or one foot on there, I don't know that.

378 Q. Yes.

A. But I know that he was standing on the grab iron.

Q. He had been in that position since the time that you had left the yard at Harrison street, was he not?

A. He was on the hind end of that train, from the time I left Harrison street, yes, sir.

Q. From your position on the footboard, you could not see what was going on ahead, as your train backed up, could you?

A. What is that?

Q. From your position on the footboard of the engine, you could not see what was going on ahead?

A. How?

Q. You said you were standing on the footboard, didn't you, when you left the Harrison street yard?

A. Yes, I was on the footboard of the tank of the engine.

Q. The tank was next to the car, wasn't it?

A. No, sir, the tank was the first object moving south.

Q. All right. Why did you get on the side of this car?

A. Because I could not get on anywheres else.

Q. Couldn't you get on the engine, at the same place where you had been riding?

A. It is not my place of business to be on the engine.

Q. I asked you if you could not have gotten on the engine?

A. That is not my place.

Q. I asked you if you could not have gotten on the engine?

(No response.)

Q. Couldn't you?
A. I am supposed to be——
Q. I asked you if you could not get on that engine, it had two footboards on it.

Mr. McSHANE: He means——
Mr. EVERETT: I do not mean anything more than what I say. I object to counsel talking before I get an answer to that.
379 The COURT: What is the question?
(Question read.)

Mr. EVERETT:

Q. (Continuing:) —instead of on the side of the car?
A. I am not supposed to be on the engine, I am supposed——

Mr. EVERETT: I move to strike it out.
The COURT: It will be stricken out.

Mr. EVERETT: Will you please answer the question if you can, if you cannot, just tell us, if you cannot, tell us.

(No response.)
Q. How?
A. Put your question again, please.

Mr. EVERETT: Read the question.
(Question read.)

A. Sure I could get on the engine, but that is not my place of business.

The COURT: What is the answer?
(Answer read.)
Mr. EVERETT: I move it all be stricken out after "sure I could get on the engine."
The COURT: Well,——
Mr. McSHANE: I think that is competent, your Honor. It is simply silly——
Mr. EVERETT: It is not responsive to my question.
Mr. McSHANE: It is whether he could get on and do his work.
The COURT: How?
Mr. McSHANE: It is a question of whether he could get on and do his work.
Mr. EVERETT: That is for the jury, whether that is his place of business or not.
Mr. McSHANE: I think that is a proper answer.
Mr. EVERETT: No.
380 Mr. McSHANE: That is a proper qualification.
Mr. EVERETT: Well, I make a motion to strike out that part.
The COURT: Just read the question and answer.
(Question and answer read.)
The COURT: It will be stricken out.
Mr. McSHANE: What is that, your Honor?
The COURT: It will be stricken out.
Mr. McSHANE: Yes.

The COURT: If there is anything wrong about the answer, you will have a right to have him change it when you go over it on redirect examination.

Mr. MCSHANE: All right.

The COURT: Is that all, Mr. Everett?

Mr. EVERETT: No, your Honor.

The COURT: Proceed then.

Mr. EVERETT:

Q. At the time when your train started up after you got the signal to pass on to this curved track, Coleman was on the front part of the train standing there, with his arm through the brake wheel, and his hand on the air, wasn't he?

A. Yes.

Q. He was there for the purpose of watching the signals or any dangerous condition which would require that train to be stopped, wasn't he?

A. Yes sir.

Q. And that was the best place on that train to see any obstruction or any dangerous conditions that you were appr-aching, that is a fact, isn't it?

A. Well——

Q. He was in the best position to see and give signals?

A. He could not give any signals.

381 Q. Well, you mean by that the hand signals, don't you?

A. Yes.

Q. But he did have the air in his hand?

Mr. MCSHANE: We have been over that a dozen times.

A. Yes sir.

Mr. EVERETT:

Q. No other brakeman of your crew was hanging on the side of your car at that time, was he?

A. No sir, not that I know of.

Q. The other brakeman was on the footboard of the engine, wasn't he?

A. Yes sir.

Q. And you three together with the engineer and the fireman composed the whole crew, didn't you?

A. Yes sir.

Q. Had the train started when you climbed up on the side of this baggage car?

A. We stopped there about half a minute, and I got right on there.

Q. You left the place that you were on the footboard?

A. I was talking to the switch tender.

Q. Yes, you left the place where you had been on the footboard of the engine, and came up and talked to the switch tender?

A. No, I got off at those switches, when we were backing.

Q. Oh.

A. When we were going south.

Q. At the time you jumped off as you went by, when the train was in motion?

A. Yes.

Q. Then you gave the engineer a signal to come ahead after you got the switch, did you?

A. Yes sir.

Q. Did you do that?

A. Yes sir.

382 Q. You were the one that selected this method of getting from the Pennsylvania track over to the Western Indiana track, weren't you?

A. No sir.

Q. Who selected that?

A. Why they told me to go over the shortest way and I took them that way.

Q. Well, then, you selected this way, didn't you, yourself, as being the quickest way?

A. I didn't suggest it.

Q. No, but you knew that it was?

A. I knew that was the quickest way.

Q. So you selected this way yourself after being told to take it the quickest way, that is a fact, isn't it?

A. No, I did not select it.

Q. Who did select it?

A. Why he told me to take the cars over the quickest way, and that——

Q. That is, he told you——

A. And I told him that the Fort Wayne was the quickest way, and he said "Take them that way."

Q. Then you told him that this was the quickest way, didn't you?

Mr. McSHANE: He just said that he did.

Mr. EVERETT:

Q. Now when you stood at the switch talking to the switch tender, how far were you away from this semaphore that struck you?

A. What?

Q. How far away from that were you?

A. From what post?

Q. From the semaphore post that struck you?

A. I should judge about 800 feet.

Q. Did you look towards the side that you were going in on, the track that you were going in on, did you look in that direction?

383 A. I could see that switch was set for us, for the cross over. We had the lower arm governing that cross over.

Q. Yes, this is a picture of the semaphore post and the place right where you were struck, isn't it, showing you Exhibit B, Defendant's Exhibit B? This is the track here marked with the letter B, isn't it?

A. That is the track; yes, sir.
Q. "A" is the post?
A. Yes sir.
Q. "C" is the place where you were brushed off?
A. I was brushed off at the post.
Q. Well, that is where the letter "C" is?
A. I was crushed at the post.
Q. Well, isn't the letter "C" there?
A. Yes, right about opposite the post.
Q. Now you say you saw that post when you got within about one hundred feet of it?
A. Yes sir.
Q. You were then hanging on the side of this car?
A. Yes sir.
Q. Were you?
A. Yes sir.
Q. And looking towards the post?
A. Looking in that direction watching the signals and the semaphores.
Q. Oh, were there other semaphores along there?
A. Well, we could see a lot of semaphores ahead of us.
Q. And you were watching them?
A. And the signals, yes sir.
Q. Were they alongside of your track; were those semaphore posts, alongside the track that you were passing over?
A. That one there was——
Q. Well, these others that you have spoken of were they alongside?
A. They were further down, they were further down about
384 a thousand feet, or so, 800 feet.
Q. You saw them down there, did you, one thousand feet away from you?
A. Yes sir.
Q. Were they adjacent, next to——
A. They were over——
Q. (continued). —to the track that you were on?
A. What is that?
Q. Were these posts that you saw a thousand feet away right alongside of the track that you were going along on?
A. There was no posts, there was overhead——
Q. Overhead signals?
A. Overhead signals, kind of a bridge like semaphores.
Q. I see, but this post that struck you, you saw that one hundred feet you say, before you got up to it?
A. About that, yes.
Q. And you saw that it was alongside of the track that you were going along, did you?
A. Yes, I seen that it was there, yes.
Q. And you were hanging out right on the outside of the car, with your two hands on the hand holds and your feet resting on something below, that was your position, was it?
A. Yes sir.

Q. You were going northeast?
A. About that, yes sir.
Q. Your face was turned to the northeast, wasn't it?
A. Turned in the direction the train was moving, yes.
Q. Towards the northeast?
A. Yes.
Q. There was nothing from the time that you first saw this semaphore post until you got up to it, to obstruct your view of it, was there?
A. Nothing.
Q. It was in your view all of the time?
385 A. But I was looking ahead.
Q. It was in your view all of the time?

Mr. McSHANE: Let him answer.

A. But I was looking ahead for the signals to see that the tracks did not foul.
Q. When you got on that curve of the track was there any signal there at all that regulated the curved track that you went on to?
A. Right before we were on to it there was a semaphore post.
Q. Was there any signal that regulated that track, any one at all, that you were looking for?

Mr. McSHANE: When do you mean, before he went on to it?

A. I don't understand.

Mr. EVERETT:

Q. No, I mean just at the time that you were going along there.
A. The question again, please.
Q. You said you were looking for signals?
A. Yes sir.
Q. Were there any signal- that you were looking out for while using that little piece of track 250 feet?
A. There was lots of signals ahead of us.
Q. Was there any signal that had anything to do with the track along there?
A. There was lots of signals ahead of us and semaphores all along down the distance there, Potts signals, one thing and another.
Q. Will you answer the question. Was there any signal that had anything to do with the regulation of that track?
A. There must have been something down there.
Q. Well, do you know of any?
A. No, I don't know because I only went over——
386 Q. No, now don't you know as a matter of fact there is not any signal at all there that has anything to do with that track?
A. There is lots of signals all the way down there.
Q. I know there is thousands of them but I say there is not any signal at all there that has anything to do with that track, that is connected with this track or had anything to do with it.

Mr. McSHANE: What is that answer?

(Answer read.)

The WITNESS: I said that there was signals down below there.

Mr. EVERETT:

Q. You mean by that that all the signals that you saw were up in the air here, don't you, semaphore posts all around?
A. Yes, there was Potts signals down below.
Q. Yes, signals all around?
A. Yes, there was Potts signals down below.
Q. On all these other tracks?
A. Yes sir, signals down below.
Q. On all these other tracks.

(Counsel hands photograph to witness.)

A. Yes sir, signals down below here (indicating). There was a Pott- signal up here (indicating), but you can't see it. There is one blurred right here in the picture.
Q. Where?
A. There is a Potts signal right there (indicating).
Q. What do you mean by a "Potts signal"?
A. There is a Potts signal right there (indicating), do you see it?
Q. That is not on this track that you are talking about, is it?

387 Mr. MCSHANE: Put a cross there where you point out the Potts signal, put a cross there.
Mr. EVERETT: Put it in ink and then we will have it.

A. It looks like one.

Mr. EVERETT:

Q. Don't say it is if you don't know it is one.
A. That looks like a Potts signal.
Q. Do you know whether that is a Potts signal?
A. I am not positive, no.
Q. It looks like a little lump of dirt there, doesn't it?
(No response.)
Q. *How*, isn't that what it looks like on the picture?

Mr. EVERETT: Well, the jury can tell what it looks like as well as you can. He says it looks like a Potts signal.

Mr. EVERETT:

Q. Well, the place you have marked does not have reference to the track marked B, the track upon which you were on at the time you were knocked off, does it?

Mr. MCSHANE: I object, if the court please. Here is a network of tracks. Whether that was on that particular track or not, that is merely calling for his conclusion.
The COURT: Read the question.
(Question read.)
Mr. MCSHANE: I object to that.
The COURT: He may answer.

A. I don't understand that.

Mr. EVERETT:

Q. I am asking you—you have marked here what you say you believe is a Potts signal?

A. Yes.

Q. That is not on, or has anything to do with the tracks you were on at the time you were approaching that, has it?

A. Well, you can't tell when you are coming down there.

Q. Will you answer the question?

388 A. You can't tell——

Q. Just answer the question, does it, do you know whether it has anything to do with this track B?

A. I don't know.

Q. Do you know of any signal any place in that neighborhood that has anything to do with this track that you went on there immediately after the switchman let you through?

A. Let me see that, please.

(Photograph handed to witness.)

A. Well, they have all signals along on the ground in that section.

Q. "They," who do you mean by that?

A. The railroads had Potts signals.

Q. That is, all these other railroads along here (indicating)?

A. Yes.

Q. There are 18 or 20 tracks around there at that point?

A. I guess so.

Q. How?

A. Just about eighteen.

Q. Each road has signals for its own tracks?

A. Yes sir.

Q. But you did not see any Potts signal for the track that you were going on, did you?

A. I saw the Potts signal down the line there.

Q. Did you see any Potts signal that had reference to the track which you were using immediately prior to this accident?

Mr. MCSHANE: I object to that, he has answered that.

The COURT: Objection sustained.

Mr. MCSHANE: He said they were there but he could not tell whether it was his track or not.

Mr. EVERETT:

Q. You are an experienced conductor of a switching crew, aren't you?

A. Well, I was an extra conductor.

389 Q. Yes, you know when a signal is meant for the track that you are running on, don't you?

A. Yes sir.

Q. Did you see any signal there that had reference to the track that you were running on after you started up on this short piece of track?

Mr. McSHANE: Wait a minute. I want to know what you mean. There is a little section of track—do you mean at the time he was on the track, or where do you mean that he was?

Mr. EVERETT: There is no objection, is there, to my——

Mr. McSHANE: Are you limiting that to a little piece of 250 feet, to that piece or the other track that he was about to enter on?

Mr. EVERETT: I am limiting that to the use of the piece of track that you have charged the Chicago & Alton with negligence in maintaining?

Mr. McSHANE: Just that little piece, is that right?

Mr. EVERETT: That is only the little section in this whole route, that is all I am talking about here, and I am entitled to know——

The COURT: Proceed.

Mr. McSHANE: He is going into a network of tracks so he cannot tell what track it was on.

Mr. EVERETT:

Q. My questions are directed to the piece of track that connects the Western Indiana with the Pennsylvania, that you were passing over at the time you were hurt. That track was about 250 feet long, wasn't it, running on a curve?

A. About that might have been longer.

Q. Now did you see, while you were looking ahead, Potts signal or any other kind that had reference to this piece of track?

390 Mr. McSHANE: He has answered that three or four times, your Honor.

The COURT: He may answer it again.

A. Well, there was a Potts signal down the line there over the cross-over.

Mr. EVERETT: I move to strike it out.

The COURT: No, it may stand.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. EVERETT:

Q. Did any of those signals have anything to do with the track that you were on?

A. I would not know. Them Potts signals were against me, and unless I was right pretty close to them I would not know.

Q. By a Potts signal, what do you mean, what is a Potts signal?

A. Well, you can see it there, there is several of them (indicating).

Q. It is a little low——

A. Two feet high.

Q. About two feet high?

A. Yes, with a little arm on it about a foot long.

Q. Did you see any Potts signal from the time that you started up after you talked with the switchman until you were brushed off, that regulated the track that you were on?

Mr. McSHANE: He has been over that.

A. Yes, I saw them down the line over, over the cross-over.
Mr. EVERETT: That is beyond this post isn't it (indicating)?
A. That is beyond the post.
Q. And that was over on a different track than the one you were running on?
A. No, it looked to be right on the line that we were run-
391 ning on.
Q. Point out the one that you saw that was on the line that you were running on?
A. I could not see in that picture, it is blurred, that picture is blurred.
Q. That picture is blurred?
A. Yes.

Mr. EVERETT (addressing Mr. McShane): Let me have your pictures, will you?
Mr. MCSHANE (handing pictures to counsel): Yes, I think it shows them.

Mr. EVERETT:

Q. Is that what you call a Potts signal (indicating on photograph)?

Mr. MCSHANE: Here they are, here are the pictures.

A. This don't show the Potts signals down in the field, they are down further off.
Mr. EVERETT: I am asking for my own information. Is this what you mean by a Potts signal?
A. No sir. There is a Potts signal right there (indicating).

Mr. MCSHANE: Mark it.
Mr. EVERETT: I will mark it with a C, that is a C. The Potts signal is marked C on Defendant's Exhibit D.

Mr. EVERETT: Now, here is your picture, this picture of the entire track, showing you Plaintiff's Exhibit A. The track marked X there is the track that you were passing, isn't it, at the time you were brushed off?
A. Yes sir.
Q. Do you see any Potts signals that regulates that track?
A. Yes, here is one right here (indicating).
Q. That looks like—does that regulate——

Mr. MCSHANE: Just a minute.

Mr. EVERETT:

Q. Does that regulate the switch track marked X, or does it regulate the track marked B?
392 A. I don't know.

Mr. MCSHANE:

Q. Which one did he mark, where is the one that you spoke of?
A. Here it is right there (indicating).

Mr. McSHANE: That is under the B, is that right?
Mr. EVERETT: Yes.
Mr. McSHANE: Under the "B" in Plaintiff's exhibit what?
Mr. EVERETT: "A."
Mr. McSHANE: Yes.

Mr. EVERETT:

Q. Do you know whether that regulates the track marked "X" or this main line track marked "B"?
A. I don't remember now.
Q. Can you tell by its appearance now?

Mr. McSHANE: I object to it, your Honor; it is not a question of how it appears there, but what the fact is.

A. It is not plain enough.

Mr. McSHANE: It is not a question of appearance, it is a question of whether a man going into a strange yard for the first time, whether he knew what this signal was or that signal was.
Mr. EVERETT: I object to the remark of counsel; there is no question pending.
The COURT: Yes, there is nothing before the court.

Mr. EVERETT:

Q. Were you looking for a Potts signal, from the time you saw this post sticking up there until you were struck?
A. I was looking for all kinds of signals, hand signals, Pott signals and semaphore signals.
Q. Who were you looking to for signals?
A. Well, in case something might occur.
Q. Did you see any one standing any place along the track that you were going along, that would be apt to give you a signal?
393 A. I don't remember seeing anybody, no.
Q. Was there any obstruction of a building or anything else, between you and the pole that struck you, for the one hundred feet that you saw it?

Mr. McSHANE: He has been over that three times.
Mr. EVERETT: He has not answered that question.
The COURT: He may answer that again.

A. No sir.
Mr. EVERETT: If you had looked at it you could have seen it during that whole one hundred feet, couldn't you?
A. Yes, but I was looking down—the post looked as though there was plenty of clearance.

Mr. EVERETT: I move to strike it out.

A. (continued). —I thought it was far enough away from the track. I was looking down the line for the signals.

Mr. EVERETT: I move to strike it out. I merely asked him if he looked he could see it, and he said yes, and he went on.

The COURT: Read the question and answer.
(Question and answer read.)
The COURT: The answer will be stricken out.
Mr. EVERETT: Well, not the first part that was responsive.
The COURT: Read the answer.
(Answer read.)
The COURT: The answer will be stricken out, all after the word "yes," will be stricken out.
Mr. MCSHANE: May I show these photographs to the jury? These are in evidence. May I hand them to the jury, so that the jury can more intelligently understand the situation?
394 Mr. EVERETT: Not while my examination is going on. I want the jury to listen to my examination, and not have their attention distracted by the pictures.
The COURT: If there is any objection, why, of course,——
Mr. MCSHANE: They belong to the jury. They may be able to follow it better.
Mr. EVERETT: I want the jury to follow the questions, and not have the jury distracted. If you want to have a five minute recess, I will be glad to hand them all of the pictures.
Mr. MCSHANE: I think that if they did, they would get a more—that they could more intelligently follow it, and understand the situation better if they see the pictures.
The COURT: I think so, but if the gentleman is objecting, we will keep them out. I do not want to let you do that and then give a reason for some error to creep in.
Mr. MCSHANE: All right.
Mr. EVERETT: The court sees my position.
The COURT: Yes, I understand that.

Mr. EVERETT:

Q. Now, the reason you were struck by this pole was because you misjudged the distance, is that right?
A. No, sir.
Q. You thought that you could clear it, didn't you?
A. What is that?
Q. You thought your body would pass in between the post and the car, didn't you?
A. I didn't think it, I didn't think it, but it looked as if there was plenty of clearance, between the—far away from the track to clear me, that is the way it looked.
Q. You thought?
A. No, I didn't think, no, sir.
Q. You saw that?
A. I saw that.
Q. You judged that there was plenty of room for your body to pass in between the car and the post?
395 A. Yes.
Q. That was your judgment?
A. Yes.
Q. And you looked at the pole all of the time as you came up to

it on the side of this car, all the time thinking that you had room to go in between there?

A. No, sir.

Q. The train was going about six miles an hour, wasn't it?

A. About 15 miles an hour.

Q. Didn't——

A. Might have been a little less than that.

Q. What is that?

A. Might have been a little less than that.

Q. Didn't you state, in your statement, that the train was going about six miles an hour at the time you were brushed off?

A. No, sir.

Mr. McSHANE: Wait a minute, wait a minute. Show it to him then. I think that he has a right to see it.

Mr. EVERETT:

Q. You have been accustomed to move off moving trains, haven't you?

A. Yes, when they are going slow, it is the custom of all the men when they are going slow.

Q. You have been accustomed to get on trains that were moving?

A. Yes, moving slow.

Q. How fast has a train been going that you have gotten off of, what is the fastest?

A. Two or three miles an hour.

Q. You never got off of a train going three miles an hour, in all your experience as a switchman, you never got off a train going over three miles an hour, is that right, Mr. Wagner?

(No response.)

Q. Do you want to go on record as saying that?

396 A. No, I might have got off the hind end of a train going a little faster.

Q. Isn't it a fact that you have got off trains going as fast as ten miles an hour, isn't that right?

A. No, sir.

Q. You never did in your life?

A. Well, I cannot just recollect ten miles an hour, might have been.

Q. Your best judgment?

A. Might have stopped off the engine when she was backing up, off the hind end of the engine.

Q. Now, if you had thought you were going to be brushed off by this pole——

A. I did not think I was going to be brushed off by this pole.

Mr. EVERETT: I ask that that be stricken out; I have not finished my question.

The COURT: Yes, it will be stricken.

Mr. EVERETT:

Q. If you had thought that you were going to be brushed off by this pole, you would have jumped off, wouldn't you?

A. I didn't *thought* I was going to be brushed off.

Q. If you thought you were going to be brushed off, you would have jumped off the train, wouldn't you?

A. If I knew I was going to be brushed off there, I certainly would have jumped off.

Q. You do not know what the distance was between the side of the car, and the post, do you?

A. What is that?

Q. Do you know what the distance was between the side of the car and the post, the car that you were on?

A. I don't exactly know, it was about three or four inches—about six inches or so. It was close enough to crush me.

Mr. EVERETT: I move that be stricken out.

397 Mr. MCSHANE: I think that is an answer.

Mr. EVERETT: Oh, let it stand, I don't care, let it stand.

Mr. EVERETT:

Q. When did you make that judgment of the distance—before you got up to the post?

A. What is that?

Q. When did you make that estimate of the distance?—before you got up to the post, while you were riding on the car?

Mr. MCSHANE: I object to that. He has told what he did sufficiently, I think.

The COURT: Overruled.

Mr. EVERETT:

Q. When did you make that estimate of the distance between the side of the car and the post,—was it when you were riding up to the post?

A. After I was injured.

Q. How far did you think the car was from the post before you were injured—what was your best judgment of that?

A. The car from the post?

Q. Yes, how far did you think that car was from the post before you were injured, what was your best judgment of that, what did you think.

A. The car from the post, or do you mean the rail from the post?

Q. From the side of the car to the post?

A. Well, it looked as if—it looked as if there was plenty of clearance, it looked to be at least five or six feet away from the track, from the track.

Q. It appeared that way to you, did it?

A. It appeared to have plenty of clearance.

Q. It appeared to you to be five or six feet away from the rail, did it?

398 A. Well, I would not say just exactly, it might have been seven feet.

Q. Well, I am asking you to tell us how much it appeared to be to you away from the side of the car?

Mr. McSHANE: That is what he has just told you.

A. It appeared to be about seven feet away from the car.

Mr. EVERETT:

Q. As you were riding along, as you were coming along, that is the time that you made that judgment?
A. Yes, sir.
Q. The day was bright?
A. Cloudy.
Q. And dark?
A. It was cloudy.
Q. Was it a dark day?
A. Well, it was cloudy, gloomy.
Q. Light as it is today?
A. No- quite.
Q. You could see the post if you looked at it, couldn't you?
A. Sure, you could see the post.
Q. You went to Denver unattended, didn't you?
A. Sir?

Mr. EVERETT: Read the question.

(Question read.)
A. Yes, sir.
Q. Traveled around all these places by yourself?
A. Yes, sir.
Q. Have you received any money from any one?

Mr. McSHANE: I object to that, unless it is from this defendant, your Honor.

The COURT: The objection will be sustained.

Mr. EVERETT: I would like to ask the question, if the court please.

Q. Did you receive any money from any one, in payment of the damages that you have sustained, for the injuries that you
399 have charged in your declaration in this case?

Mr. McSHANE: I object to that, your Honor; it is not cross examination, anyway.

Mr. EVERETT: If the court please, the whole object of this testimony is to show that this defendant owes him money.

Mr. McSHANE: What do you claim; tell us that, Mr. Everett?

Mr. EVERETT: I have a right to cross examine whether he has satisfied and released some other joint tort feasor.

The COURT: It would not be cross examination.

Mr. EVERETT: I say it is cross examination. The proposition of his testimony is that we owe him money and that he has not been paid money. That is what they are establishing by his testimony.

Now, on cross examination, I am entitled to go into the subject matter. I have the latitude of the subject matter that is brought out on the direct examination, not any particular subject, or particular matter closely defined. It is the general topic that they brought out on the direct examination.

Mr. McSHANE: It is not cross examination any way, your Honor.

Mr. EVERETT: Well, I have stated my position to the court, I have told the court my position. Now,——

The COURT: I will hear you, Mr. McShane.

Mr. McSHANE: I beg pardon.

The COURT: I will hear you, Mr. McShane.

(Counsel thereupon proceeded to argue at length, relative to the subject of the admissibility of testimony concerning the payment of money to the plaintiff by parties other than the defendant herein.

400 Before the argument, the jury were excused and left the court room, and counsel continued with the argument in the absence of the jury.)

The COURT: Well, we will take this up and consider it further at 2 o'clock.

Court adjourned until 2 P. M. same day, May 17, 1911.

WEDNESDAY, May 17th, 1911—2:00 o'clock p. m.

Court met pursuant to adjournment.

Present same as before.

Mr. McSHANE: I prefer to go on and finish this up first, and then take up that afterwards when it comes up.

The COURT: Very well.

JOSEPH MATT WAGNER, resumed the stand for further cross-examination by Mr. Everett, and testified as follows:

The COURT: Read the last question.

Mr. EVERETT: I withdraw the last question.

Q. Have you talked with your lawyer since the noon adjournment?

A. Just one minute.

Q. What is that?

A. Just a word there, that is all.

Q. Have you discussed with them the question of what you had signed, in the way of releases, had you?

A. No, the only question he asked me was how much I had got from the relief, that is the only question.

Q. That is the only question. Didn't you explain to him

401 the papers you had signed?

A. No, I did not, no, sir; I did not sign any papers, only checks.

Q. Didn't you discuss what possible questions I might ask you this afternoon?

A. No, sir.

Q. And what answers you should make to them?
A. No, sir.
Q. But you did talk with him since the noon adjournment?

Mr. McSHANE: He has said so.

A. Just that one question.

Mr. EVERETT:

Q. You received money on each one of these checks, didn't you?

(Counsel hands a number of checks to the witness.)

Mr. McSHANE: I object to that.

The COURT: Objection sustained.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. EVERETT: I desire to make an offer.

(The following proceedings occurred out of the hearing of the jury:)

Mr. EVERETT: I offer to show by this witness that he received the amount of money on each one of the checks, 29 checks, which have been offered as exhibits; I offer further to prove that he received it under his membership in the Relief, under the rules of the Relief Department of the Chicago, Burlington & Quincy
402 Railroad Company; and that he released and discharged in full the Burlington Railroad from all claims for damages which he might have growing out of or incidental to the accident for which he has sued for in this case.

Mr. McSHANE: If he has the release, I have no objection to its introduction, I object to the rest.

Mr. EVERETT: Well, now, on that very question, I offer to show that he has received that amount of money, shown by these checks.

Mr. McSHANE: The court has ruled on that.

Mr. EVERETT: The court did not understand that I was going further, that that was a preliminary question, that I was going further to show that what he did receive was in payment for his damages.

Mr. McSHANE: Well, ask another question, please. You have asked the one, and the court has ruled on it.

Mr. EVERETT: The court may want to change his ruling, when he understands it is a preliminary question.

The COURT: I did not see any way to rule on it, except to rule on the bunch.

Mr. McSHANE: What is that?

The COURT: I ruled on it in a bunch. There may be some portions I would let in, but the way it came in, I could not rule any other way.

Mr. EVERETT: I simply asked him at that time, whether he received and money on those checks.

The COURT: Yes.

Mr. EVERETT: That was preliminary to show what I said I would show here later.

The COURT: Yes, that is a matter for defense.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

403 (The above and foregoing are all of the proceedings occurring out of the hearing of the jury, the following proceedings occurring in the hearing and presence of the jury.)

Mr. EVERETT:

Q. How much money have you received already for the injury which you received on December 15th, 1908——

Mr. MCSHANE: I object to that, your Honor. It is not cross examination; it is a matter of defense, and it assumes that he received something in the way of settlement of this case.

Mr. EVERETT: My position on that is that the subject matter of the indebtedness that originated to this plaintiff is an issue in this case, and has been proved or attempted to be proved on the direct examination by counsel. That has been the object of the entire examination. I have a right on cross examination to show that that situation does not pertain.

The COURT: Read the question.

(Question read.)

Mr. EVERETT (continuing): —if any?

Mr. MCSHANE: I object to it, except it be from this defendant.

The COURT: Objection sustained.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. EVERETT:

Q. Have you received any money from any person or company, for the payment of the damages that you sustained on December 15, 1908?

404 A. No, sir. I received relief benefits——

Mr. MCSHANE: Wait a minute, you have answered it, that is enough.

Mr. EVERETT: I object to counsel interrupting the witness. He said he received relief benefits.

The COURT: You gentlemen know how to practice law.

Mr. EVERETT: What is that?

The COURT: You gentlemen know how to practice law.

Mr. EVERETT: I ask that the witness be permitted to answer the question. He said he received some money from the relief department.

Mr. MCSHANE: That is a voluntary answer.

Mr. EVERETT: That is all right; the witness may want to qualify his answer. He has made a positive answer that he may have to account for later. If he wants to qualify it to protect himself, he is entitled to do it, I think.

Mr. MCSHANE: There is no question pending.

Mr. EVERETT: I ask that he be permitted to complete his answer.

The COURT: If you want to ask him further along the same line, you may do so.

Mr. EVERETT: What is that?

The COURT: If you want to ask further along the same line, you may do so.

Mr. EVERETT: You started to say that you had received some money from some relief department, did you?

A. Yes.

Q. How much did you receive from the relief department?

Mr. MCSHANE: I object to that.

Mr. EVERETT: Under what circumstances?

Mr. MCSHANE: I object to it; He said he did not receive
405 any in payment of the damages; he received some money from the relief department, I object to it as not competent. It is not cross examination either. It is a matter of defense.

The COURT: Objection sustained.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. EVERETT:

Q. You say that before you got to this semaphore pole, you squeezed your body in as tight as you could to the railroad car. Did you desire to avoid hitting the pole?

A. Yes, sir.

Q. How far away from the pole, how far before you came up to the pole was it that you began to squeeze in your body?

A. I should judge about six feet.

Q. You should judge about six feet?

A. Yes.

Q. You did that because you saw the pole was too near the car for you to pass in between the car and the pole, did you not?

A. No, I done that, because I wanted to be, I wanted to be on the safe side.

Q. By the "safe side," what do you mean?

A. Get as close as I could, to pull myself as close to the car as I could, right up against the car.

Q. So you would avoid striking the pole, that was your object, was it?

A. Yes, avoid striking the pole.

Q. By that time you had learned that the pole was closer to the track than seven feet, hadn't you?

406 A. No, I did not.

Q. You still thought it was seven feet away, did you?

A. Yes, I thought there was plenty of clearance.

Q. Even after you began to pull your body in for safety?

A. Well, it looked to me as though there was plenty of clearance.

Q. But you thought you would hit it, did you?

A. No, I didn't think I might hit it, but to be on the safe side, I pulled myself close to the car.

Q. It is not your custom to pull yourself in to avoid objects, when you do not think you are going to strike them, is it?

Mr. McSHANE: I object to that, your Honor.

The COURT: Oh, he may answer that.

A. We always do that, that is, if we don't strike anything we pull ourselves close to the car at all times.

Mr. EVERETT:

Q. That is when you are coming up to the objects that are standing near the track?

A. Yes.

Q. (continued). That is, part of your business is to watch objects of that kind?

Mr. McSHANE: I object to that, your Honor.

Mr. EVERETT: That is proper, your Honor, his conduct.

The COURT: He may tell what he did.

A. What is the question, please?

Mr. EVERETT:

Q. I say it was part of your usual custom to watch for objects that were along the track, and you would pull yourself in on that side of the car, would you?

A. Sure, pull ourselves close to the side of the car.

Q. You kept watching out for those things that were close to the track?

407 A. Yes, sir, and signals, Potts signals and semaphores, any of them that might be in the way.

Q. Such as shanties or buildings?

A. Yes, or trains.

Q. You watched for shanties, too, didn't you?

A. Yes.

Q. In going around in these various switching yards, there are buildings that are very close to the tracks, aren't there, some times?

A. Oh, yes, in the lumber district, yes, sir.

Q. You watch out for yourself, don't you?

A. Yes,

Q. You had been doing that for all the number of years that you had been a switchman, hadn't you?

A. Yes, sir.

Q. Also you have to watch out when you come to a standing train which is on a curve, and your train is on a straight track, you have to watch, to see that you are not brushed off by the edge of the car that is passing?

A. To see that there is sufficient clearance, sure.

Q. Yes, that is your business to look out for those things, wasn't it, prior to this accident?

A. Yes.

Q. How?
A. Yes, sir.
Q. You always did it prior to this accident?
A. I have done it at all times, this time, and always.
Q. You always did that?
A. This time and always.
Q. This was part of your duty as an operating trainman?

Mr. McSHANE: He has been over that.
The COURT: Yes, I think so. Objection sustained.
Mr. EVERETT: How did he answer? That it was his duty?
Mr. McSHANE: You have asked it two or three different ways and times.
408
Mr. EVERETT: I take an exception to the ruling. I claim I have a right to show what his duty was in that connection.
To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. EVERETT:

Q. You were examined by Dr. Brasso, were you, about March, 1911?
A. Dr. Basso, yes.
Q. What?
A. Yes.
Q. What is the name?
A. Basso.
Q. He made an examination of you?
A. Yes, sir.
Q. Where?
A. At his office.
Q. At whose request did you go there?
A. Dr. Bevin.
Q. Dr. Bevin is associated with the relief department of the Burlington railroad, is he?
A. He is at the Presbyterian Hospital, I do not know whether he is with the relief or not.
Q. Had Dr. Bevan been treating you?
A. No, sir.
Q. Had he made an examination of you?
A. Yes, sir.
Q. Dr. Bevan told you to go to Dr. Brasso?
A. Basso.
Q. Basso?
A. Yes.
Q. Dr. Basso was an expert on nerves, wasn't he?

Mr. McSHANE: I object. Ask him whether he knows whether he is an expert on nerves.

Mr. EVERETT:

Q. That is why you went?

409 Mr. McSHANE: Did he answer that?
The COURT: No.
Mr. McSHANE: Well, if he knows whether he was or not.

Mr. EVERETT:

Q. You went there because Dr. Basso was a nerve specialist, isn't that the fact?

A. I do not know that he is a nerve specialist—I know that he is a nerve specialist, yes.

Q. That is why you went there, to have him examine you as to your nervous condition, isn't that it?

A. Yes, sir, and I was sent there by Dr. Bevan.

Q. How much do you weigh at the present time?

A. 162—162 pounds, or 160 pounds.

Q. When were you weighed?

A. Oh, about three or four days ago.

Q. Where?

A. I weighed myself at the Alexian Brothers Hospital.

Q. 1902, you weighed only 156 pounds, isn't that true?

A. What is that?

Q. In 1902, you weighed only 156 pounds, that is a fact, isn't it?

A. 1902?

Q. Yes.

A. About that.

Q. Don't you know that the semaphore poles that struck you was under the control and management of the Chicago & Western Indiana Railroad Company?

A. I don't know anything of the kind.

Q. You don't know anything about it, do you?

A. No, sir.

Q. Don't you know it stood on the property, the real estate owned by the Chicago & Western Indiana Railroad Company?

A. No, sir.

410 Q. The Chicago & Western Indiana Railroad Company tracks are adjacent to it, aren't they?

A. They are on the other side of the tower.

Q. And the signal arm of that semaphore pole regulates the Chicago & Western Indiana tracks, doesn't it, at that point?

A. No, sir.

Q. Does it regulate the Pennsylvania tracks?

A. The lower arm regulates that "Y".

Q. No, I am talking about the pole that hit you. There was only one arm on that, wasn't there?

A. Yes, sir.

Q. That is the one I am talking about.

A. All right what is the question?

Q. That one regulates the Chicago & Western Indiana tracks, doesn't it?

A. I don't know about that.

Q. Well, that one did not regulate the track that you were on, when you were struck, did it?

A. No, sir.

Q. Don't you know that in the case that you have pending against the Chicago & Western Indiana and other railroad companies, that you have charged that that railroad and the Illinois Central Railroad, and the Santa Fe Railroad all owned that track and the semaphore—the track upon which you were hurt, and the semaphore which you struck, didn't you make that charge in your lawsuit that is pending against those companies?

Mr. McSHANE: If he knows.

A. Well, I got it through a signal engineer——

Mr. EVERETT:

Q. My question is, didn't you charge in your case against these other companies that these other companies owned that track upon which you were at the time you were hurt, and the semaphore pole which struck you?

Mr. McSHANE: I object to that, the papers are the best
411 proof of that.

The COURT: Objection sustained.

Mr. McSHANE: I don't suppose he ever saw them.

Mr. EVERETT:

Q. That case is still pending, isn't it?

Mr. McSHANE: It is admitted that it is.

Mr. EVERETT: What?

Mr. McSHANE: It is admitted that it is.

Mr. EVERETT: Admitted that it is still pending and is for $30,000?

Mr. McSHANE: Well——

Mr. EVERETT: That is right, is it?

Mr. McSHANE: Well, whatever it shows there.

Mr. EVERETT: Well, it is thirty thousand dollars in your declaration.

Mr. McSHANE: It is against them all.

Mr. EVERETT: Yes.

Mr. McSHANE: We wanted to see who is the owner if you got out, we wanted to see who the owner is, and be sure and get him.

Mr. EVERETT: You admit you don't know who should sue, whether you are suing the right party or not.

Mr. McSHANE: I think we have sued them, but we do not want any hocus pocus, to sue one and have the other one say they did not own it, but some one else did.

Mr. EVERETT: That is all.

Mr. McSHANE: Is that all?

Mr. EVERETT: Yes.

Mr. EVERETT: That is all.

412 Redirect examination.

By Mr. McSHANE:

Q. Mr. Wagner, one thing that I forgot. In your abdomen there is there any hole?

A. Yes sir, there is quite a cavity here (indicating). I have to wear——

Mr. EVERETT: I object to that.

Mr. MCSHANE: There is one thing that I forgot.

Mr. EVERETT: I object to the question as leading in form and suggestive, and contains the answer, and it can be answered by yes or no.

The COURT: Yes, it is leading and objectionable.

Mr. EVERETT: I ask that the answer be stricken out.

The COURT: It will be stricken.

Mr. MCSHANE:

Q. Mr. Wagner will you tell if there is not anything that you have not already told, about your abdomen, will you please tell us.

A. Well, I have to wear a suspensory around my abdomen and back.

Q. Suspending what part, what, supporting what?

A. Supporting the abdomen, and I wear also a suspensory for the testicles.

Q. What else about that?

A. There is a large cavity here (indicating). Well I should judge it was about—about an inch deep, and three inches long.

Q. Where is that?

A. Right here, right above the penis. They opened the bladder there twice. There is another large incision in here (indicating). There is another below the testicle. Then there was another here for drainage.

413 Q. Now sit down, please. Now before you struck that pole had anyone ever told you anything about how close it was to the track

Mr. EVERETT: I object to that question.

Mr. MCSHANE: I have alleged it and I omitted to ask it.

Mr. EVERETT: I object to that as leading and suggestive.

Mr. MCSHANE: I omitted that.

The COURT: Overruled.

Mr. EVERETT: Exception.

To which ruling of the court the defendant by its counsel, then and there duly excepted.

A. No sir.

Mr. MCSHANE:

Q. I call your attention to this exhibit Plaintiff's Exhibit A.

(Counsel hands photograph to witness.)

Q. Do you know which track you were going to, that you were—that your train was going to run on to after it left that curved track, which straight track you were going to run on to.

(Counsel indicates on photograph.)

Mr. EVERETT: I object, he has answered which track it was.

Mr. MCSHANE: No, he has not answered which track it was.

Mr. EVERETT: The track that the train was on.
Mr. MCSHANE: No.
Mr. EVERETT: He has answered that.

Mr. MCSHANE:

Q. I am asking if he knew what track his train was going to run on, when it got to the straight track that this curved track hits.

414 Q. Did you know that?
A. No sir, no sir, might use either one of them tracks.

(Indicating on photograph.)

Q. Depending on how the switches were set?
A. Yes sir.

Mr. EVERETT: I object to the form of the question.
The COURT: Yes, the form of the question is objectionable.

Mr. MCSHANE:

Q. Well, the point is, as you were going around there then, the point is, did you know which one of the tracks ahead of you your train was going on?
A. No sir.
Q. That order that you spoke about from your yardmaster that morning, was that in writing?
A. The message is right there, yes sir (indicating).
Q. Look at that and state whether or not that is what he gave you?

(Counsel hands paper to witness.)

A. Yes sir, this is the message I received about five minutes to seven in the morning, that there were silk——
Mr. EVERETT: Wait a minute.

Mr. MCSHANE: Wait a minute.

Q. Is that the message that you got from the yardmaster?
A. Yes sir.
Q. There is some writing there that has evidently been written on afterwards, hasn't it?
A. Well, that is J. M., that is general yardmaster Jim Magner, P. J. Riley——

Mr. EVERETT: I object to reading from that.

A. He is assistant yardmaster.

415 The COURT: Well, confine yourself to the question. Answer the question, Mr. Wagner.

Mr. MCSHANE:

Q. There is some little stuff written by yourself there, I don't care what it is, is that written by yourself?
A. Yes.

Q. Was that on it at the time?
A. No sir.

Mr. EVERETT: Let me see it, will you please, Mr. McShane?
Mr. MCSHANE: Just a minute, please.

Q. And was this matter written on the back (indicating on paper)?
A. No sir, I put that on afterwards.
Q. After the accident?
A. Yes sir.

(Mr. McShane hands paper to Mr. Everett.)

Mr. MCSHANE:

Q. Do you know who that Air Line——

Mr. EVERETT: You are not offering this in evidence (indicating paper)?
Mr. MCSHANE: No, I don't care to. You may put it in if you want to, just as you like about it.

Q. You have spoken of an Air Line track. Do you know what company the Air Line belongs to by common report?

Mr. EVERETT: I object to that.

A. I don't know, I do not.

The COURT: Objection sustained.
Mr. EVERETT: I wish the court would instruct the witness not to answer when there is an objection until the court rules.
The COURT: Yes. The witness will not answer until after counsel will have an opportunity to object.

Mr. MCSHANE:

Q. Well, was the Air Line a Burlington track, that is the only point.

Mr. EVERETT: I object to the form of the question.
The COURT: He may answer that.
416 Mr. EVERETT: Exception.
To which ruling of the court the defendant, by its counsel, then and there duly excepted.

A. I don't know.

Mr. MCSHANE:

Q. In coming down through the br*di*ge as I understand your train was on the west track, is that right?
A. Going south over the bridge.
Q. The west track?
A. Yes sir.
Q. And which side of the footboard were you riding on, if you remember?
A. On the east side.
Q. That would be the engineer's side?

A. Engineer's side, right hand side.

Q. Now, as you came south on the west track, southbound main, then as I understand it, they let you through the cross over on to the northbound main, and from that on to the Y?

A. Yes sir.

Mr. EVERETT: I object to the question and I ask that the answer be stricken out until I have time to make my objection.

The COURT: Yes. I wish you would carefully follow what I said. I expect you to do that. Give the gentleman a chance to object. What is the objection.

Mr. EVERETT: My objection is that the question is bad in form, because it is leading suggestive, and because the subject matter has been covered on the direct examination and the cross examination.

Mr. MCSHANE: I think it has, but I want to clear it up.

417 Mr. EVERETT: Then I would not ask it again.

Mr. MCSHANE: Just to clear up one thing.

Q. How far, Mr. Wagner, did your train travel from the time that it left the southbound Pennsylvania track and reached the north-bound, how far did it travel on the north-bound before it got to the Y, about?

A. About 400 feet, four to five hundred feet, down hill.

Q. I don't know that I have asked you, but I think I have. This door that you say you stood at you said was 15 feet from the end of the car. Which end?

A. From the north end.

Q. That is the forward end as you were going?

A. That is the direction that we were going in, in a northeasterly direction, 15 feet, about 15 feet.

Q. Was it possible for you as the conductor of that train to perform your duties in getting around there, to ride on the engine?

Mr. EVERETT: I object to that question.

A. No, it was not.

The COURT: The objection will be sustained.

Mr. MCSHANE: Exception.

To which ruling of the court the plaintiff, by his counsel, then and there duly excepted.

Mr. MCSHANE:

Q. What is the fact as to whether there is any custom in ordinary switching operations of that kind, as to where the man in charge shall ride, whether the forward end of his train or at the rear.

Mr. EVERETT: I object to that question.

The COURT: Overruled.

418 Mr. EVERETT: Exception.

To which ruling of the court the defendant by its counsel, then and there duly excepted.

Mr. EVERETT: May I state my objection, if the court please?

The COURT: You may.

Mr. EVERETT: There is no charge in this declaration of a violation of any custom. The custom of a railroad company, one railroad company cannot bind another railroad company. In this case the custom that this man would be accustomed to would be the Burlington's custom, and he has sued the Alton. The issues in this case are whether the Alton did something in the construction of this track alone. That is the only charge of negligence.

Mr. MCSHANE: It is on the question of his care and conduct, your Honor.

The COURT: Yes, I understand that, overruled.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. What was the custom as to where the man in charge should ride in making a movement of that kind, of the kind that you were making at the time of the accident?

Mr. EVERETT: Same objection to the question.

The COURT: Overruled.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

The WITNESS: Is it overruled?

The COURT: Yes.

419 Mr. MCSHANE: The court says you may answer.

A. Well, he was on the rear end there and he could not give no signal to the engineer in case the air failed.

Mr. EVERETT: I move the answer be stricken out.

The COURT: Strike it out. The jury are instructed to disregard that statement of the witness.

Mr. MCSHANE:

Q. What was the custom as to where you as conductor, or the conductor of the train should ride under such circumstances?

Mr. EVERETT: I object to it unless he first proves that there was a custom.

Mr. MCSHANE: He has said that there was.

The COURT: Overruled.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel then and there duly excepted.

Mr. MCSHANE:

Q. I refer to what was the custom as to where the conductor should ride under such circumstances, whether he should ride back in the engine or near the front end of his train.

Mr. EVERETT: I object to that form of question.

The COURT: Yes, that form is objectionable. If there is a custom let him state what it was.

Mr. McSHANE: Yes.

Q. What was it?
A. The custom is to ride on the front end of the train.
Q. I will ask you as a switchman of your years and experience, if in making a movement of that kind it was necessary to the safe and proper operation of the train, if a man should be at the place where he could see ahead, and also signal the engineer if necessary.

Mr. EVERETT: I object to that question. It is the ultimate
420 fact for this jury to determine what was necessary.
Mr. McSHANE: All right, I don't care anything about that.
The COURT: Very well.

Mr. McSHANE:

Q. Did you ever see these papers filed in your lawsuit, these other suits against these other companies?
A. No sir.
Q. I filed them as your lawyer, did I?
A. Sir?

Mr. EVERETT: I object to it, how does he know?

Mr. McSHANE:

Q. You did not see them?
A. No sir.
Mr. McSHANE: That is all.

Recross-examination.

By Mr. EVERETT:

Mr. EVERETT: Just a minute, Mr. Wagner, please.

Q. Did any one connected with the Burlington railroad company ever tell you any particular pole to look out for?
A. No sir.
Q. (Continued:) That stood on the railroad track?
A. No sir.
Q. Did anyone ever tell you any particular obstruction that was near the track, or would be liable to brush you off?
A. No sir.
Q. That matter was left entirely for you to look out for yourself, was it?

Mr. McSHANE: Wait a minute, I object to that.
The COURT: Objection sustained, that is a matter for the
421 jury to determine.
Mr. EVERETT: I except to the ruling.
To which ruling of the court the defendant, by *his* counsel, then and there duly excepted.

Mr. EVERETT:

Q. You say you did not know which track you were going on when you left this Y?

A. I did not know, no.

Q. You depended upon the man in the towers to turn the switches properly, did you?

A. Yes sir, there is two tracks leading across there, two leads.

Q. So that the man in the towers had the entire control of your train so far as turning the switches——

Mr. McSHANE: Wait a minute.

Mr. EVERETT: Can't the gentleman quit starting in with that "wait, wait," when I am asking a question. I object to that conduct.

The COURT: Yes.

Mr. McSHANE: I want him to wait and not answer.

Mr. EVERETT: That is all right, the witness has been told not to answer.

Q. Now as your train was moving past along over this Y, on to some other track, you depended entirely upon the men to control the switches, didn't you?

Mr. McSHANE: I object to that. For what do you mean?

Mr. EVERETT: For the direction of your train.

Mr. McSHANE: All right, go ahead.

A. Yes sir.

Mr. EVERETT:

Q. Then you did not have to look out for any switches, did you?

422 Mr. McSHANE: I object to that.

A. I had to see that I was——

The COURT: Wait a minute.

A. Excuse me.

Mr. McSHANE: All right, I withdraw the objection.

The COURT: Proceed.

Mr. EVERETT:

Q. You didn't have to look out for these switches because the men—you did not know the tracks yourself, you depended upon the men to operate the switches from the towers, to turn the right switches, that is right, isn't it?

A. Yes sir, because he might side track us for some other passenger train, or something, put us on some other track.

Q. Well, he could do that and you would not have any control over it yourself, would you?

Mr. McSHANE: I object to that, your Honor. He has told what the facts are about turning the switches.

The COURT: He may answer that.

Mr. EVERETT:

Q. The man that controlled the switch in the tower, or some place had the right to put you on the side track if it was necessary to do it, and you could not do anything else to avoid it, could you?

A. No sir.

Q. As these tracks lay there on this right-of-way you did not know one track from the other, did you?

A. I knew the four main tracks of the Western Indiana, two freight and two passenger tracks.

Q. Those are the only tracks that you knew about?

A. Yes sir.

Q. How far from the place that you entered this "Y" was the semaphore located to the northeast?

423 Mr. McSHANE: He has been over that three or four times.

The COURT: He may answer that again.

Mr. EVERETT: No, you brought this out?

A. About eight or nine hundred feet.

Mr. EVERETT:

Q. Isn't it a fact that this "Y" track was only 250 feet in length itself?

A. Well, from the Fort Wayne semaphore, where we got this semaphore, to go down to the point of the switch, was about four or five hundred feet.

Q. Well, there was a switch immediately before you entered onto this "Y" track, wasn't there, this 250 feet of track?

A. A switch?

Q. Well, wasn't there a switch there?

A. A switch south from the point where we entered the "Y," about two or three hundred feet, or more, cross-over.

Q. How far was the semaphore from the beginning of the "Y" track as you entered it?

A. To where?

Q. The semaphore pole that struck you—how far was that from the beginning of this "Y" track, of this 250 feet of track?

A. Oh, about 100 feet or a little more.

Q. This "Y" track begins at this point, doesn't it, going that way (indicating on photograph)?

A. No, beginning at the point here for the Fort Wayne (indicating).

Q. Is this the Western Indiana track running here (indicating)?

A. Where?

Q. Running along here (indicating)?

A. I don't know who owns that track.

Q. Isn't that one (indicating) and this one (indicating), aren't they both the main lines of the Chicago & Western Indiana?

424 A. I don't know who owns them.

Q. But that is a main line track, isn't it?

A. This is a main?

Q. This is a main line track isn't it, (indicating)?

A. Yes, I think it is.

Mr. EVERETT: I will mark that on Defendant's Exhibit B with the letter D. Now, from that track, after you left that main line track,

how far is it on this "Y" track marked B over to the semaphore that struck you?

Mr. McSHANE: Which track did he locate as the Western Indiana?

Mr. EVERETT: That one (indicating on photograph).

Mr. McSHANE: That is not Western Indiana at all.

Mr. EVERETT: What is it?

Mr. McSHANE: That is Santa Fe or Illinois Central.

A. I did not say it was Western Indiana.

Mr. McSHANE: I thought you did.

The WITNESS: I did not say it was Western Indiana. No, I told him that I did not know who owned it.

Mr. McSHANE: Oh, I beg pardon.

Mr. EVERETT: Well, then, I will take your word for it. It is the main line track, that is all I want to know?

Mr. McSHANE: Yes. Here are the Western Indiana tracks. (Indicating on photograph.) These two (indicating), are used by the Santa Fe, Madison & Northern and Illinois Central.

Mr. EVERETT: All I want to know is to point out the distance between (indicating).

Mr. McSHANE: Hasn't that been shown by three or four witnesses?

Mr. EVERETT: Not by any one that I know of.

Mr. McSHANE: Well, what is the question.

Mr. EVERETT:

425 Q. What is the distance on Exhibit B from "1" to "2"?

A. I could not tell you.

Q. About how much?

A. I don't know.

Q. Haven't you any idea at all? Is it 500 feet?

A. Oh, no, it might be 20 feet, 30 feet, 15 feet.

Q. But up to the point marked one on this photograph marked B, you had been coming on a straight line towards it, hadn't you, and not on a curve?

A. Well, that is—let me see that other picture, please.

Q. Well, don't you know without looking at the pictures.

Mr. McSHANE: This (indicating) shows it. Now you were wrong about that, that shows it. It is curved all the way from the Pennsylvania.

Mr. EVERETT: Where?

Mr. McSHANE: Comes around here (indicating).

Mr. EVERETT: Why it is a straight track along here (indicating), there it goes straight down (indicating). It does not curve until it gets here (indicating).

Mr. McSHANE: What is the picture?

Mr. EVERETT: Right here (indicating).

Mr. EVERETT:

Q. Isn't it a fact that after you looked at the coutheast from point

1 on this picture, that the track is straight over to the main line that you left of the Pennsylvania?

A. I don't remember that.

Mr. McSHANE: Your picture will show that if it is so, or if it — on the curve the picture will show that.

Mr. EVERETT:

Q. What was the nearest point that you stopped at last before reaching this pole that struck you?

426 Mr. McSHANE: Hasn't he been over that, your Honor, when he started in on that switch?

Mr. EVERETT: I want to clear it up whether he stopped at the semaphore or the switch that put him in on this track.

The COURT: Overruled.

Mr. EVERETT: Do you understand that question?

A. What was it?

Q. What is the nearest point to this semaphore that you stopped the last time before you were hurt?

A. What was the nearest point to this semaphore?

Q. Yes, that you stopped at.

Mr. McSHANE: The one that hurt you?

Mr. EVERETT: Now I am conducting this examination, Mr. McShane.

Mr. McSHANE: Yes, he is always talking about that.

Mr. EVERETT: I object to counsel's remarks here.

The COURT: Yes, gentlemen, one at a time.

Mr. EVERETT: Exception to that remark of counsel.

To which remark by counsel for plaintiff, the defendant then and there duly excepted.

The WITNESS:

Q. What did you say? How far it was from that to the switch?

Q. No, I asked you what was the distance from the semaphore to the place where you last stopped before you were hurt?

A. What semaphore do you mean?

Q. The one that you were struck on.

A. Before we started in there do you mean?

Q. Here is the semaphore that you were struck by (indicating). Now some place back here (indicating) before you got up to it, you made a stop, didn't you?

A. Yes sir.

Q. The last stop that you made before you were struck?

427 A. Yes sir.

Q. Now I want to know how far that stop was from the semaphore that struck you?

A. I said two or three times about eight hundred——

Q. Say it again so we will be sure of it?

A. Between eight and nine hundred.

Q. Is there any particular place on a railroad car that it is cus-

tomary for a conductor to travel on, or does he travel on all parts of the car?

A. He travels on all parts of the car.

Q. He uses his own judgment on that, doesn't he?

A. Yes sir.

Q. He may travel on the top of the car or on the running board if he wants to, isn't that right?

A. Yes sir.

Q. He may travel on the side of the car if he wants to isn't that right?

A. Yes sir, if he can get there.

Q. He can travel on the ends of the car if he wants to?

A. Yes sir.

Q. He may travel on the engine, in the cab if he wants to?

A. No sir; he is not supposed to be in the cab of the engine at all while on duty.

Q. Well they do do it, don't they, cold days, don't they get up and hug close to the fire box?

Mr. McSHANE: I object to that, that has nothing to do with this case.

Mr. EVERETT: We will see.

The COURT: Yes, he may answer that, that is within reasonable bounds.

Mr. EVERETT: Q. It is reasonable.

Q. Isn't it a fact that the conductors do get up and travel
428 in the engine on cold days?

A. Not shoving trains, not when they are pushing trains.

Q. Well they may travel either on the front or rear footboard, may they not, if they so desire?

A. No sir.

Q. Haven't you traveled on a footboard?

A. I have with light engines but not when I had cars.

Q. Didn't you go on a footboard from Harrison street to this place?

Mr. McSHANE: I object to that, that is an entirely different proposition, your Honor.

Mr. EVERETT: You have established a custom. Let us see if there is a custom.

Mr. McSHANE: No, he is talking about this kind of a custom——

The COURT: The objection will be sustained as to this particular question.

Mr. EVERETT: Exception to the ruling.

To which ruling of the court the defendant by its counsel, then and there duly excepted.

Mr. EVERETT:

Q. So that there is not any particular custom that you know about that fixes a particular place on a freight car or a baggage car for a conductor to ride on, is there?

A. Well——

Q. They have the matter in their own will to choose, isn't that right?

A. Yes sir, they have got to be in sight of the engineer.

Q. After you have done that you can stand any place on the train that you want to, that is the custom, isn't it?

A. That is the custom, yes.

Q. And that choice lies with the conductor himself, that is right, isn't it?

429 A. He has got to be on a safe place to ride.

Q. That choice lies with the conductor himself, doesn't it, the place where he shall ride?

(No response.)

Q. He has a right and does choose where he shall ride on a train, doesn't he?

A. Yes sir.

Q. And he makes that choice in view of the nature of the work that he is doing, doesn't he?

A. Yes sir.

Q. And it is, if he switches in around curved tracks in a switching yard, it is his business to look out for himself, isn't it, in choosing the place that he rides upon the cars?

Mr. McSHANE: I object to that, your Honor. He is bound to use ordinary care, of course to look out for his train crew.

The COURT: He may answer that.

Mr. EVERETT: Read the question.

(Question read.)

Mr. EVERETT:

Q. (continued). That is right, isn't it?

Mr. McSHANE: I desire to save an exception to that, your Honor? I think that is not just right. It ought to be qualified "in connection with his duty."

The COURT: I thought it was in there. He has been putting that in there.

Mr. McSHANE: He has stated that is all a man has to do is to look out for himself. He has got to look out for his train and his crew.

The COURT: He has been using those other words "in view of his duty."

Mr. EVERETT: Yes, in view of the work he was doing, that goes right along.

The COURT: I thought that was connected with this whole matter.

430 Mr. EVERETT: It is not necessary to repeat the whole thing when the witness understands it. It goes right along.

The COURT: Proceed.

Mr. EVERETT: Read the question.

(Question read.)

Mr. EVERETT:

Q. (continued). Taken in connection with what work he has got to do and the situation he is working in?

A. Well, if we have got a long train we are usually in the center of the train; if we have got a short train, three or four cars, we ride on the first car that we are pushing. We are always looking——

Q. And that choice always lies with the conductor himself, doesn't it?

(No response.)

Q. That choice lies with you as conductor, doesn't it, where you shall ride?

A. No, we are supposed to ride in the middle of the train when we have got a large train.

Q. That is on a straight track, isn't it?

A. Straight, or curved track more so. We have to be in sight of one another; we have got to see one another to operate the train.

Q. But you have got the choice of where you shall ride, as conductor?

A. Yes sir, I have.

Q. There is no fixed rule?

A. Sometimes——

Q. Wait a minute. There is no fixed rule about where you shall ride on the car, is there?

A. No, there is no fixed rule that I know of.

Q. All you are told to do is to be careful for your own safety, look out for the things that are near the car that are apt to brush you off, and be in a place where you can perform your duty, and still
431 be in a safe place. That is all they tell you, isn't it?

A. Yes sir, that is all, look out for signals and cross-overs.

Q. Yes.

A. So that you can be in sight of the engineer.

Q. That is right, look out for obstructions on the side of the car, that is right, they tell you that, too, don't they, or the ends of the cars?

Mr. McSHANE: Just a minute. Don't double up so many questions, ask him one thing at a time. Just ask him one. You run on to another and then he forgets the first, and then you emphasize the last.

Mr. EVERETT: I take an exception to counsel's remarks as to what I have done. I ask the court to rule whether they are proper or not.

The COURT: It is not proper for both of you to talk at once.

Mr. EVERETT: What?

The COURT: It is not proper for you to both talk at once. Both of you will have an opportunity to make any statement you want.

Mr. EVERETT: In order to preserve the record as to counsel's conduct, the court must rule on my objection and I must take an exception. That is what I want to get at, that his conduct was improper, I want to preserve that objection in the record.

The COURT: You gentlemen know how to practice law and you should not butt in on to each other.

Mr. EVERETT:

Q. When you entered the employ of the Burlington railroad they instructed you that it was your duty in going around freight yards,

asking deliveries of freight cars and baggage cars, to observe
432 dangerous conditions that might be about the track such as building- that you would be apt to be rubbed against, or switch tracks, or switch handles that you would be apt to be rubbed against, or cars that might be standing on switch tracks, curved tracks, which would come up near to the edge of your train; semaphore poles that might be too close to the track; that you were required to be in a position to signal the engineer; that you had the right to choose your position, taking into consideration all the conditions about you, isn't that a fact?

Mr. McSHANE: Now do you mean—do you ask was he told that when he went to work, is that what you were asking?

Mr. EVERETT:

Q. I am asking you if that is not what you were told?
A. No, I was not told.
Q. Wasn't that the rule and custom—was that the custom?
A. You have too many questions there all in one, I cannot answer.
Q. Well, was it the custom for a conductor to take those things into consideration in selecting the place that he occupied on a car, wasn't that the custom?
A. He was to use his judgment.
Q. Yes.
A. For safety.
Q. Taking those other things into consideration, isn't that right?
A. No, those things—I don't remember what you said there.
Q. I am not asking about what was said, I am asking you: in forming your judgment as to where it was safe for you to ride, wasn't it your custom to observe the conditions that were about you?
A. Yes, I was looking out for all the signals and semaphores ahead of me.
433 Q. The place that the train was running, too?
A. Yes sir.

Mr. EVERETT: That is all.

Re-redirect examination.

By Mr. McSHANE:

Q. Was there any way of getting on top of these cars?
A. No sir.

Mr. McSHANE: That is all. The plaintiff rests, your Honor.

Re-recross-examination.

By Mr. EVERETT:

Q. You knew that there was no way to get to the top, didn't you?
Mr. McSHANE: Oh, let us end it some place.
A. We never ride on top of passenger cars.

Mr. EVERETT:

Q. Well, you knew you could not get on top of this car before you climbed on the side of the car, didn't you?

A. What is that?

Mr. McSHANE: He said so.

Mr. EVERETT:

Q. You knew you could not get on top of the car that you were on at the time that you climbed up on the side of it?
A. I did not climb on the top, on the side of it.
Q. Well, you got up on the side of the car?

Mr. McSHANE: I object to that, your Honor.

Mr. EVERETT:

Q. Just take that picture will you please, and look at that card.

434 (Counsel hands photograph to witness.)

Mr. McSHANE: It is drawing out the examination, I object.
The COURT: Overruled.

Mr. EVERETT:

Q. At the time that you got on the side of this car in the position that you were in when you were struck, you knew that you could not get on top of the car, didn't you?
A. Yes sir.

Mr. EVERETT: That is all.

(Witness excused.)

Mr. McSHANE: The plaintiff rests.

Whereupon the plaintiff rested his case.
And thereupon at the close of the plaintiff's case the defendant by its counsel moved the court to exclude the evidence offered by the plaintiff, and to instruct the court to find the defendant not guilty; and at the same time the defendant presented a written motion and a written instruction to the same effect, as follows:

435 STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

General No. 273,695, Term No. 6501.

JOSEPH M. WAGNER
vs.
CHICAGO & ALTON RAILROAD COMPANY, a Corporation.

Now comes the defendant, Chicago & Alton Railroad Company, by Winston, Payne, Strawn & Shaw, its attorneys, at the conclusion of the plaintiff's case, and moves the court to exclude the evidence from the consideration of the jury, and requests the court to give

the jury an instruction to find the defendant not guilty, and with this motion presents such instruction in writing.

WINSTON, PAYNE, STRAWN & SHAW,
Attorneys for Defendant.

The court instructs the jury to find the defendant not guilty.

435½ (Court and counsel thereupon retired to his Honor's chambers and argued in support of and in opposition to the motion for a directed verdict at length, citing authorities.

But the court denied said motion and refused to give said instruction; to which action of the court in denying said motion, and in refusing to give said instruction, the defendant, by its counsel, then and there duly excepted.

And thereupon the defendant to maintain the issues on its part introduced the following evidence, to-wit:

Mr. EVERETT: The defendant offers in evidence the declaration files in the case of Joseph M. Wagner vs. the Chicago, Burlington & Quincy Railroad Company, Chicago & Western Indiana Railroad Company, the Illinois Central Railroad Company, and the Atchison, Topeka & Santa Fe Railroad Company, that is pending in the Circuit Court of Cook County, Number 302,655.

Mr. MCSHANE: You might state to the jury when it was filed.

Mr. EVERETT: The declaration was filed December 14th, 1910.

Mr. MCSHANE: 1910?

Mr. EVERETT: 1910.

Mr. MCSHANE: December 14th?

Mr. EVERETT: Yes.

Mr. MCSHANE: It was one day before the two years had run out, wasn't it?

Mr. EVERETT: What is that?

Mr. MCSHANE: It was one day before two years had run out, wasn't it?

436 Mr. EVERETT: I object to any argument by counsel, any statement by counsel about two years running out.

The COURT: Objection sustained.

Mr. EVERETT: I take exception to his remark.

To which remark of counsel for plaintiff, the defendant, by its counsel, then and there duly excepted.

The COURT: The court would suggest that we have less colloquy between attorneys.

Mr. EVERETT: Also the præcipe in the same case filed December 13th, 1910.

Mr. MCSHANE: Aren't they all in, Mr. Everett, wasn't that our agreement?

Mr. EVERETT: You may put them in if you want to but I don't care to encumber the record with a whole lot of immaterial things.

Mr. MCSHANE: I think your Honor, they ought to all go in. I don't think it is at all material, but I want the pleas of the railroads to go in. If any goes in it ought all to go in.

The COURT: I thought that all went in, everything went in.

Mr. EVERETT: They are all in.
Mr. MCSHANE: All right.
Mr. EVERETT: I don't want to encumber the record. The declaration is all I want in but——
Mr. MCSHANE: They are all in?
Mr. EVERETT: Yes, they are all in.
Mr. EVERETT: At that time, gentlemen of the jury I will not stop to read this declaration to you. It charges that on the 15th day of December, 1908 the defendants owned, operated and controlled this railroad which extended among other places from Chicago in the county and state aforesaid, in and through other states; they were then and there common carriers by railroad; that they were engaged——

437 Mr. MCSHANE: If you are going to read it in evidence, you ought to read as it is there, and not argue it and give the substance of it. I object to his giving a summary of what he things are the material parts of it. If it is in at all it is all in evidence.

Mr. EVERETT: I take it I can read any part of the exhibit that I think is applicable to my case.
Mr. MCSHANE: I do not think he has a right to read a piece here and there if it is all in.
The COURT: The entire matter is introduced in evidence, I understand.
Mr. EVERETT: Well, the whole document is offered in evidence.
The COURT: Yes.
Mr. MCSHANE: Then you have no right to argue any part.
Mr. EVERETT: I am not arguing at all.
Mr. MCSHANE: Well, if you read it at all, read it all.
Mr. EVERETT: What?
Mr. MCSHANE: I say if you read it at all, why read it all.
Mr. EVERETT: Very well.
(Which said documents last above referred to, being offered in evidence by counsel for the defendant, and admitted in evidence by the court, without objection, are returned herewith and made a part of this bill of exceptions, and said documents are in words and figures as follows, to-wit:)

438 STATE OF ILLINOIS,
County of Cook, ss:

Filed Dec. 14, 1910.

In the Circuit Court of Cook County.

Gen. No. 302,655, T. No. 8487.

JOSEPH M. WAGNER
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO & Western Indiana Railroad Company, Illinois Central Railroad Company, and Atchison, Topeka and Santa Fe Railroad Company.

Joseph M. Wagner, Plaintiff by James C. McShane, his attorney, complains of Chicago, Burlington and Quincy Railroad Company, Chicago and Western Indiana Railroad Company, Illinois Central Railroad Company, and the Atchison, Topeka and Santa Fe Railway Company, defendants, of a plea of trespass on the case, and which lat-er three defendants are hereinafter referred to as the "Other defendants."

For that, whereas, the plaintiff alleges, that long prior to and on towit, the 15th day of December A. D. 1908, the said other defeendants owned, possessed and operated certain railroads, which extended, among other places, from Chicago in the county and State aforesaid, into and through other states, and they were then and there common carriers by railroads, and as such were then and there engaged upon, and by and in connection with their said railroads and
439 the track hereinafter referred to, in commerce between the several states, and the defendant, Chicago, Burlington & Quincy Railroad Company, also, long prior to and then and there owned, possessed and operated a certain other railroad which extended among other places from Chicago aforesaid, into and through other states, and it was then and there a common carrier by railroad and was as such then and there engaged upon, by, and in connection with its said railroad with commerce between the several states, and the plaintiff was then and there employed by the said Chicago, Burlington & Quincy Railroad Company, in such commerce as a switchman. to work and switch upo- and in connection with certain engines and cars, which it was then and there operating upon and in connection with its said railroad in such commerce, and as such switchman he earned towit, One Hundred Dollars and the plaintiff further alleges that the said "Other defendants," then and there owned possessed and operated a certain track, which constituted a part of, or connection with their said railroad and which said track furnished a connection between their said railroads and a certain other railroad in Chicago, aforesaid, and upon and over which said track the defendant, The Chicago, Burlington & Quincy Railroad Company and other railroad Companies, at the invitation and with the knowl-

edge and consent of the said, "other defendants," were, long prior to
then and there, accustomed to operate engines and cars.
440 And the plaintiff further alleges that at the time aforesaid,
the said Chicago, Burlington & Quincy Railroad Company, and at the invitation and with the knowledge and consent of the said "Other defendants," and for a valuable consideration incurring to the said "other defendants was operating one of its the Chicago, Burlington & Quincy Railroad Companie's said trains upon which the plaintiff was employed as such switchman upon and over said track, which connected said "Other Defendants," said railroads with a certain other railroad as aforesaid.

And the plaintiff further alleges that the said "other defendants" long prior to the time in question, wrongfully and negligently placed and cause- and permitted to be places a certain semaphore a signal post alongside of and so close to their said track, that said post was likely and liable to cruch switchman against and knock them from the side or sides of cars, while being operated on said track past said post, and said "Other defendants wrongfully and negligently permitted said post to be and remain in said position from thence to and including the time of the injuries hereinafter complained of and whereby the switchman employed — trains which were operated over said track, as aforesaid, were exposed to great danger of bodily injury, and all of which such facts plaintiff alleges, the said "Other defendants," and the Chicago, Burlington & Quincy Railroad Company knew, or by the exercise of ordinary care in that behalf would have known of a sufficient length of time, prior to the injuries hereinafter complained of to have enabled them and each of them *of* the exercise of ordinary care, to have removed said post a safe distance from said track, which was practicable to do, and the plaintiff through no
want of ordinary care upon his part did not know of the
441 said position of the said post in reference to said track or the
danger incident thereto, and the plaintiff further alleges that the said "other defe*d*nants," and the Chicago, Burlington & Quincy Railroad Company, also knew, or by the exercise of ordinary care in that behalf would have known that plaintiff was so employed upon said track and of his said lack of knowledge of the said position of said post, and of the danger incident thereto, insufficient time, prior to said injuries, to have enables them and each of them, by the exercise of ordinary care to have notified or informed the plaintiff of the said post of said pos-tion and of the danger incident thereto, and it was their duty to have done so, but they and each of them negligently failed and neglected to so notify and inform him.

And the plaintiff further alleges that upon the occasion in question while, in the discharge of his duty as said switchman was riding upon the side of one of the cars of the said train, upon which he was employed as aforesaid, which it was being operated upon or over said track and past said post, and while, as he alleges, he was exercising ordinary care for his own safety as a direct result of the consequence of the said dangerous proximity of said post to said track, and of his being informed of that fact, he was thereby then and there caught and crushed between the said post and the side of said car, and was

knocked from the side of said car to and upon the ground there, and the bones of his pelvis, and diverse *and* bones and ligaments, muscles and tendons and membrane of his body were thereby then and there sprained dislocated broken and otherwise injured, and he was
442 cut bruised and wounded about his head, face, limbs and body and sustained serious injuries to diverse of his internal organs, including his bladder and a serious shock and injury to his spine and nervous system and mental faculties and as a direct result thereof he has ever since suffered and will continue permanently to suffer great pain and has become permanently disfigured, crippled, sick, sore, disordered, and incapacitated from attending to and transacting his regular business, or any ordinary business or affairs, and he has thereby been, and will continue permanently to be deprived of large earnings which he might and otherwise would have made and lay out, and will continue to be required to incur and expend and lay out for medical attention, nursing, medicine and otherwise, diverse large sums of money amounting to towit, Five Hundred Dollars in and about endeavoring to be cured of his said injuries, sickness and disorder, occasioned as aforesaid.

The the damages of the plaintiff of Thirty Thousand Dollars, wherefore he brings this suit, etc.

(Signed) JAMES C. McSHANE,
Attorney for Plaintiff.

443 Filed January 10th, 1:42 P. M., 1911. Joseph E. Bidwell, Clerk, Per Greener, Deputy.

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

Gen. No. 302,655, Term No. 8487.

JOSEPH M. WAGNER, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, THE ATCHISON, Topeka and Santa Fe Railway Company et al., Defendants.

And the defendant, The Atchison, Topeka and Santa Fe Railway Company, by Robert Dunlap, Lee F. English and James L. Coleman, its attorneys, comes and defends the wrong and injury, when, etc., and says that it is not guilty of the said supposed grievances above laid to its charge, *ar* any other or either of them in manner and *from* as the plaintiff as above thereof complained against it and of this the said defendant puts itself upon the country, etc.

ROBERT DUNLAP,
LEE*E* F. ENGLISH,
JAMES L. COLEMAN,
Attorneys for Defendant, The Atchison, Topeka & Santa Fe Railway Co.

444 Filed Jan. 14th, 11.40 A. M. Joseph E. Bidwell, Clerk, Per Greener, Deputy.

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

Gen. No. 302,655, Term No. 8487.

JOSEPH M. WAGNER
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO & Western Indiana Railroad Company, Illinois Central Railroad Company, and The Atchison, Topeka & Santa Fe Railroad Company.

Now comes the defendant, the Chicago & Western Indiana Railroad Company, by C. D. Austin its attorney and defends the wrong and injury, when, etc., and says that it is not guilty of the said supposed grievences in the manner and from as the plaintiff has above complained against it, in his said declaration, and of this, its puts itself upon the country, etc.

C. G. AUSTIN,
Attorney for Defendant Chicago & Western Indiana Railroad Company.

And for a further plea in its behalf comes the said defendant the Chicago & Western Indiana Railroad Company by C. G. Austin, its attorney and defends the wrong and injury, when, etc., and says that on the date aforesaid, it did not then and there own, possess and operate a certain track constituting a part of, or connection with its said railroad and other railroads in Chicago, and did not then and there operate engine and cars upon and over the same, as by the plaintiff alleges in his said declaration, and of this it puts itself upon the country.

C. G. AUSTIN,
Attorney for Defendant Chicago & Western Indiana Railroad Co.

445 Filed Jan. Eleven, Ten A. *N.*, 1911. Joseph E. Bidwell, Jr., Clerk, Per Greener, Deputy.

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of said County.

302,655, 8487.

JOSEPH M. WAGNER
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY and Western Indiana Railway Company, Illinois Central Railway Company and Atchison, Topeka & Santa Fe Railway Company.

Case.

Damages, $30,000.00.

And now comes the Illinois Central Railroad Company, one of the defendants in the above entitled case by Messrs. Calhoun, Lyford & Sheean, its attorneys, and defends the wrong and injury, when, etc., and says that it is not guilty of the said supposed grievances therein laid to its charge in the plaintiff's said declaration, in manner and form as the same are therein alleged, and of this this defendant puts itself upon the country, etc.

And for a further plea herein to said declaration this defendant Illinois Central Railroad Company says actio non, beacuse it says that it was not either the sole owner of or a joint owner with the other defendants, or any of them, disignated by the plaintiff in his said declaration as the "other defendants" of the said railroad track upon which it is alleged in said declaration the train upon which the plaintiff was employed was being operated at the time of his alleged injuries, and which said track referred to is de-
446 scribed by said plaintiff in his said declaration as a "certain track which constituted a part of or connection with their (said other defendants') said railroads" and was not in any way interested in the same; and that this defendant did not, eother alone or in connection with said other defendants, or any of them, invite said Chicago, Burlington, & Quincy Railroad Company to operate its said train upon said track and did not receive from said Chicago, Burlington & Quincy Railroad Company any valuable consideration therefor.

This defendant further says that it had nothing whatever to do with the placing of the said semaphore or signalpost mentioned in the said plaintitt's declaration and it was not either jointly or solely with said "other defendants" or any of them, the owner of or interested in or in any way connected with the manag-ment or location of said semaphore or signal-post.

And this it is ready to verify; wherefore it prays judgment, etc.

CALHOUN, LYFORD & SHEEAN,
Attorneys for the Illinois Central Railroad Company.

Filed Jan. 18, 9.10 A. M. 1911. Joseph Bidwell, Jr., Clerk, per Gibbs, Deputy.

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

302,655, 8487.

JOSEPH M. WAGNER
vs.
CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, CHICAGO and Western Indiana Railroad Company, Illinois Central Railroad Company, and Atchinson, Topeka and Santa Fe Railway Company.

447 Now comes the Chicago, Burlington & Quincy Railroad Company, one of the defendant- in the above entitled cause, by J. A. Connell, its attorney, and defends the wrong and injury, when and etc., and says that it is not guilty of the said supposed grievances above laid to its charge, nor any or either of them, in manner and form as the plaintiff has above thereof complained against it, and of this the said defendant puts itself upon the country, etc.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
By J. A. CONNELL, *Its Attorney.*

Filed Apr. 18, 1911. Joseph Bidwell, Jr., Clerk.

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

Gen. No. 302,655, Term No. 8487.

JOSEPH M. WAGNER, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO AND Western Indiana Railroad Company, Illinois Central Railroad Company, and The Atchison, Topeka and Santa Fe Railway Company, Defendants.

448 To James C. McShane, Esq., Attorney for Plaintiff; J. A. Connell, Esq., Attorney for Defendant C., B. & Q. R. R. Co.; C. G. Austin, Esq., Attorney for C. & W. I. R. R. Co., Defendant; Calhoun, Lyford and Sheean, Attorneys for Defendant I. C. R. R. Co., Chicago, Illinois:

Please take notice that on Tuesday, the 18th day of April, 1911, at the opening of Court or as soon thereafter as counsel can be heard we shall, before his honor, Judge Slusser, in the room then occupied by him as a court room in the County Building, Chicago, Illinois, ask leave of Court to file an additional plea in the above entitled cause as per copy of such additional plea hereto attached.

Dated this 17th day of April, 1911.

ROBERT DUNLAP,
LEE ENGLISH, AND
JAMES L. COLEMAN,
Attorneys for Defendant
The A., T. & S. F. Ry. Co.

Received a copy of the above notice and plea this 17th day of April, 1911.

JAMES C. McSHANE,
Attorney for Plaintiff.
J. A. CONNELL,
Attorney for Defendant
C., B. & Q. R. R. Co.
W. S. KIES AND
C. G. AUSTIN,
Attorney- for Defendant
C. & W. I. R. R. Co.
CALHOUN, LYFORD AND
SHEEAN,
Attorneys for Defendant
I. C. R. R. Co.

449 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit — of Cook County.

Gen. No. 302,655, Term No. 8487.

JOSEPH M. WAGNER, Plaintiff,
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO & Western Indiana Railroad Company, Illinois Central Railroad Company, and The Atchinso-, Topeka & Santa Fe Railway Company, Defendants.

By leave — court first had and obtained, the defendant The Atchinson Topeka and Santa Fe Railroad Company, filed the followinh additional plea in the above entitled cause:

And for a further plea in this behalf to the said declaration, the said defendant, The Atchinson Topeka and Santa Fe Railroad Company, says that the plaintiff ought not to have his aforesaid action against the said defendant, because its says that at the time alleged in the said declaration it did not own possess or operate either solely or jointly with any or either of the defendants, designated in said declaration as "other defendants," a certain track which furnished a connection between the railroads of said "other defendants," and a certain other railroad in Chicago, upon and over which, it is alleged in said declaration, the train upon which the plaintiff was employed was being operated at the time of his allaged injuries, and was not in any way interested in the same, and that this defendant did not, either alone or in connection with any or either of said "other defendants" invite the said Chicago Burlington & Quincy Railroad Company to operate its said train upon the said
450 track, and did not receive from said Chicago Burlington & Quincy Railroad Company any valuable consideration therefor.

This defendant further says that it did not, either solely or jointly with any or other of said "other defendants" place and cause and permit to be placed said semaphore or said signal post alongside of and close to said track as alleged in said declaration, and that it was not, either solely or jointly with any or either of said "other defendants," the owner of or interested in or in any way connected with the management operating or location of said semaphore or signal post.

And of this the said defendant puts itself upon the cou-try, etc.

ROBERT DUNPAL,
LEEE F. ENGLISH,
JAMES L. COLEMAN,
Attorneys for said Defendant, The Atchinso-, Topeka & Santa Fe Ry. Co.

Mr. EVERETT: I will read this declaration to the jury.

Counsel thereupon read the declaration last above refer-ed to, to the jury.

Mr. EVERETT: I will ask the reporter to mark that the defendants' exhibit one (1).

Said declaration was thereupon marked by the reporter defendants' exhibit 1.

Mr. EVERETT: I ask to withdraw that and substitute a copy in lieu thereof of the fact that that is an *an* original document in Court.

Mr. *N*cSHANE: Well, that may be done later.

The COURT: No objection.

451 Mr. EVERETT: I offer in evidence 29 checks identified by the witness Joseph M. Wagner.

Mr. McSHANE: I want to object, your Honor, to the introduction of these checks. I think this objection will run to all matters pertaining to the relief department. I object to their introduction upon the ground first that there is no privity of contract——

Mr. EVERETT: There is nothing before the Court as to the relief department.

Mr. McSHANE: I am stating my objection. First on the ground that there is no privity of contract between the Alton Railroad Company and the plaintiff, secondly, because the contract itself is contrary to public policy and void under the federal law. But I ask the Court to reserve its ruling on that objection until all of this matter has been heard, I think it all ought to be all in there, I ask that it go in under objection.

Mr. EVERETT: Well, you are in a very peculiar position. You ought to insist that it go out or go in. I do not see how you can invite the Court to commit an error when he is doing that——

Mr. McSHANE: Just a minute, it can only hurt us if it — error. I ask the Court to reserve the ruling in that matter. I understand it is the practice, if it — injurious it can hurt us alone, and when the Court hears it and after it is all in, the Court will be able intel-igently to rule on my proposition.

452 Mr. EVERETT: The proposition is 29 checks which are to be introduced in evidence or not introduced. I am offering them.

The COURT: They may go in subject to further consideration.

Mr. McSHANE: Yes, let them go in subject to further consideration, that *it* all that I ask.

Mr. EVERETT: I ask that they be marked ex-ibits 2 to——

Mr. McSHANE: Mark them as a bunch.

Mr. EVERETT: Yes, this bunch of exhitits 29 checks I will have marked defendant's exhibit 2.

Mr. McSHANE: Let me see them, are they all alike?

Mr. EVERETT: Just different dates and amounts.

Mr. McSHANE: Is the writ-en matter on each one just the same?

Mr. EVERETT: Just the same.

Mr. McSHANE: Absolutely?

Mr. EVERETT: Absolutely.

Mr. McSHANE: Well, then you might read one.
Mr. EVERETT: What is that.
Mr. McSHANE: Well, then you might read one.
Mr. EVERETT: I will read one to the jury then, if the Court please.
The COURT: Yes.
Mr. McSHANE: Just read one to the jury, and then they can understand what they are like.
Mr. EVERETT: They are defendants' exhibit 2.
Which said checks last above referred to being 29 in number, being offered and admitted in evidence, and being marked Defendants' Exhibit 2, are in words and figures as follows towit:

453 DEFENDANTS' EXHIBIT "2."

Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 46698.

No Protest. $34.00.

CHICAGO, January 5, 1909.

Pay to the order of Joseph Wagner (certificate No. 77541) Thirty-four Dollars and charge to the relief fund. This amount is in payment of accident benefits for 17 days from Dec. 15 to 31, 1908, inclusive and is paid and accepted under the regulations of the relief department.

J. A. DENNEY,
Assistant Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable to at the Commercial National Bank or The Merchant's Loan & Trust Company, Chicago.

The following endorsements appears on the back:
Joseph Wagner. Hospital of St. Anthony de Padua, by Sister M. Lioba, superior. The Commercial National Bank of Chicago. Nathaniel R. Losch, Cashier, paid on January 9, 1909. Through Chicago Clearing House. Paid through Chicago Clearing House. H. 7 M. June 9, 1909. To the Hibernian Banking Association. Ass't Aud. for Treasurer Dep't. June 9, 1909. C. B. & Q. R. R. Co.

454 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 48514.

No Protest. $62.00.

CHICAGO, Feb. 1, 1909.

Pay to the order of Joseph Wagner (certificate No. 77541) Sixty-Two Dollars and charge to the relief fund. This amount is in pay-

ment of accident benefits for 31 days from Jan. 1 to 31, 1909, inclusive and is paid and accepted under the regulations of the relief department.

F. N. REDFERN,
Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable to at the Commercial National Bank or The Merchant's Loan & Trust Company, Chicago.

The following endorsements appears on the back:
Joseph Wagner. Jos. Zajicik. Pay to the order of The American Trust and Savings Bank, Chicago, Ill. All prior endorsement- guaranteed, Lawndale Savings Bank, Salat, Polak and Kopeck, Props. Paid through Chicago Clearing House. A. M. 17 A. M. August 9, 1909. To the American Trust & Savings Bank. The Merchant's Loan & Trust Company, clearing house. August 10, 1909. Dep't —. Paid. Ass't Aud. for Treasurer Depertment, August 10, 1909. C. B. & Q. R. R. Co.

455 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 50388.

No Protest. $56.00.

CHICAGO, Mar. 3, 1909.

Pay to the order of Joseph Wagner (certificate No. 77541) Fifty Six Dollars and charge to the relief fund. This amount is in payment of accident benefits for 28 days from Feb. 1 to 28, 1909, inclusive and is paid and accepted under the regulations of the relief department.

J. A. DENNEY,
Assistant Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable *to* at the Commercial National Bank or The Merchant's Loan & Trust Company, Chicago.

The following endorsements appears on the back:
Joseph Wagner. Joseph M. Wagner. Paid through Chicago Clearing House, 16, Oct. 9, 1909. To the Illinois Trust & Savings Bank, Oct. 9, 1909. Dep't Paid. Ass't Aud. for Treasurer Department. Oct. 9, 1909. C. B. & Q. R. R. Co.

456 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 52119.

No Protest. $62.00.

CHICAGO, April 1, 1909.

Pay to the order of Joseph Wagner (certificate No. 77541) Sixty Two Dollars and charge to the relief fund. This amount is in payment of accident benefits for 31 days from March 1 to 31, 1909, inclusive and is paid and accepted under the regulations of the relief department.

J. A. DENNEY,
Assistant Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable *to* at the Commercial National Bank or The Merchants' Loan & Trust Company, Chicago.

The following endorsements appears on the back:
Joseph Wagner. Joseph M. Wagner. The Merchants' Loan & Trust Company. Clearing House, Oct. 9, 1909. Dep't. Paid. Paid through Chicago Clearing House. 16. Oct. 9, 1909. To the Illinois Trust & Savings Bank. Ass't Aud. for Treasurety Dep't, Oct. 9, 1909. C. B. & Q. R. R. Co.

457 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 53806.

No Protest. $60.00.

CHICAGO, May 3, 1909.

Pay to the order of Joseph Wagner (certificate No. 77541) Sixty Dollars and charge to the relief fund. This amount is in payment of accident benefits for 30 days from April 1 to 30, 1909, inclusive and is paid and accepted under the regulations of the relief department.

F. N. REDFERN,
Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable *to* at the Commercial National Bank or The Merchants' Loan & Trust Company, Chicago.

The following endorsements appears on the back:
Joseph Wagner. Joseph M. Wagner. The Merchants' Loan & Trust Company. Clearing House, Oct. 11, 1909. Teller. Paid. Paid through Chicago Clearing House. 16. Oct. 9, 1909. To the Illinois Trust & Savings Bank. Ass't Aud. for Treasurery Dep't, Oct. 9, 1909. C. B. & Q. R. R. Co.

458 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 55523.

No Protest. $62.00.

CHICAGO, June 3, 1909.

Pay to the order of Joseph Wagner (certificate No. 77541) Sixty Two Dollars and charge to the relief fund. This amount is in payment of accident benefits for 31 days from May 1 to 31, 1909, inclusive and is paid and accepted under the regulations of the relief department.

F. N. REDFERN,
Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable *to* at the Commercial National Bank or The Merchants' Loan & Trust Company, Chicago.

The following endorsements appears on the back:
Joseph Wagner. Joseph M. Wagner. The Merchants' Loan & Trust Company. Clearing House, Oct. 9, 1909. Department paid. Paid through Chicago Clearing House. 16. Oct. 9, 1909. To the Illinois Truct & Savings Bank. Ass't Aud. Tr-as. Dep't, Oct. 9, 1909. C. B. & Q. R. R. Co.

459 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 56974.

No Protest. $60.00.

CHICAGO, July 3, 1909.

Pay to the order of Joseph Wagner (certificate No. 77541) Sixty Dollars and charge to the relief fund. This amount is in payment of accident benefits for 30 days from June 1 to 30, 1909, inclusive and is paid and accepted under the regulations of the relief department.

F. N. REDFERN,
Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable *to* at the Commercial National Bank or The Merchants' Loan & Trust Company, Chicago.

The following endorsements appears on the back:
Joseph Wagner. Joseph M. Wagner. The Merchants' Loan & Trust Company. Clearing House, Oct. 9, 1909. Dep't paid. Paid through Chicago Clearing House. 16. Oct. 9, 1909. To the Illinois Trust & Savings Bank. Ass't Aud. Treas. Dep't, Oct. 9, 1909. C. B. & Q. R. R. Co.

460 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 58463.

No Protest.

$62.00.

CHICAGO, Aug. 4, 1909.

Pay to the order of Joseph Wagner (certificate No. 77541) Sixty Two Dollars and charge to the relief fund. This amount is in payment of accident benefits for 31 days from July 1 to 31, 1909, inclusive and is paid and accepted under the regulations of the relief department.

F. N. REDFERN,
Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable *to* at the Commercial National Bank or The Merchants' Loan & Trust Company, Chicago.

The following endorsements appears on the back:
Joseph Wagner. Joseph M. Wagner. The Merchants' Loan & Trust Company. Clearing House, Oct. 9, 1909. Dep't Paid. Paid through Chicago Clearing House. 16. Oct. 9, 1909. To the Illinois Trust & Savings Bank. Ass't Aud. Treas. Dep't, Oct. 9, 1909. C. B. & Q. R. R. Co.

461 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 59966.

No Protest.

$62.00.

CHICAGO, Sept. 2, 1909.

Pay to the order of Joseph Wagner (Certificate No. 77541) Sixty Two Dollars and charge to the Relief Fund. This amount is in payment of accident benefits for 31 days from Aug. 1 to 31, 1909, inclusive and is paid and accepted under the regulations of the Relief Department.

J. A. DENNEY,
Assistant Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable at the Commercial National Bank or The Merchants' Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. Joseph M. Wagner. The Merchants' Loan & Trust Co. Clearing House, Oct. 9, 1909. Dep't Paid. Ass't Aud. for Treasury Dep't, Oct. 9, 1909. C. B. & Q. R. R. Co. Paid through Chicago Clearing House. 16. Oct. 9, 1909. To Illinois Trust & Savings Bank.

462 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 61671.

No Protest. $60.00.

CHICAGO, Oct. 1, 1909.

Pay to the order of Joseph Wagner (Certificate No. 77541) Sixty Dollars and charge to the Relief Fund. This amount is in payment of accident benefits for 30 days from Sept. 1 to 30, 1909, inclusive and is paid and accepted under the regulations of the Relief Department.

F. N. REDFERN,
Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable at the Commercial National Bank or The Merchants' Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. Marshall, Field & Co., retail. No. 4. Oct. 13, 1909. To the Merchants' Loan & Trust Company. Paid through the Chicago Clearing House No. 41, Oct. 14, 1909. To the Merchants' Loan & Trust Company. Merchants' Loan & Trust Company. Clearing House, Oct. 14, 1909. C. B. & Q. R. R. Co.

463 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 63566.

No Protest. $62.00.

CHICAGO, Nov. 3, 1909.

Pay to the order of Joseph Wagner (Certificate No. 77541) Sixty two Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 31 days from Oct. 1 to 31, 1909, inclusive, and is paid and accepted under the regulations of the Relief Department.

J. A. DENNEY,
Assistant Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchant's Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. Varinek S. Rite. Cook County State Savings Bank. Paid through Chicago Clearing House. P. M. 23 P. M. Nov. 9, 1909. Central Trust Company of Illinois. The Merchants Loan & Trust Company, Clearing House. Nov. 9, 1909, Dep't Paid, Ass't Aud., for Treasurer. Nov. 9, 1909. C., B. & Q. R. R. Co.

464 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 65073.

No Protest. $60.00.

CHICAGO, Dec. 3, 1909.

Pay to the order of Joseph Wagner (Certificate No. 77541) Sixty Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 30 days from Nov. 1 to 30, 1909, inclusive, and is paid and accepted under the regulations of the Relief Department.

F. M. REDFERN,
Superintendent.

To the Treasurer of the C., B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchant's Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. F. W. Bewensdorf. Paid to the order of the Continental National Bank, 38, of Chicago, Illinois, 38. All prior endorsements guaranteed. Monarch Brewery of United Breweries Company, Charles Stein, Mgr. The Commercial National Bank of Chicago, Nathan-el R. Lorch, Cashier. Paid December 16, through Chicago Clearing House. Paid through Chicago Clearing House 11. Dec. 16, 1909. To the Commercial Nat'l Bank, Ass't Aud. for Treas., Dec. 16, 1909. C., B. & Q. R. R. Co.

465 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 66596.

No Protest. $44.00.

CHICAGO, Jan. 5, 1910.

Pay to the order of Joseph Wagner (Certificate No. 77541) Forty four Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 31 days from Dec. 1 to 31, 1909, inclusive, and is paid and accepted under the regulations of the Relief Department.

J. A. DENNY,
Assistant Superintendent.

To the Treasurer of the C., B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchant's Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. Charles E. Deauchamp. The Commercial National Bank of Chicago, Nathaniel R. Losch, Cashier. Paid Jan. 17,

1910. Paid through the Chicago Clearing House. Paid to the order of Hamilton National Bank, Chicago. Previous restrictive endorsement guaranteed. 25. Central National Bank, Denver, Colo. Paid through Chicago Clearing House M. A. 21, Ill. Jan. 17, 1910. Hamilton National Bank. Ass't Aud. for Treasurery Dep't. Jan. 17, 1910. C., B. & Q. R. R. Co.

466 Chicago, Burlington & Quincy Railroad Company Relief Department.

No. 68674.

No Protest. $31.00.

CHICAGO, Feb. 5, 1910.

Pay to the order of Joseph Wagner (Certificate No. 77541) Thirty one Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 31 days from Jan. 1 to 31, 1910, inclusive, and is paid and accepted under the regulations of the Relief Department.

F. M. REDFERN,
Superintendent.

To the Treasurer of the C., B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchant's Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. Paid the Commercial National Bank, 6094, Chicago, Ill., or order, 6094. All prior endorsements guaranteed. March 3, 1910. First National Bank, San Diego, Cali., F. J. Belcher, Jr., Cashier. The Commercial National Bank of Chicago, Nathaniel R. Losch, Cashier. Paid March 8, 1910, through Chicago Clearing House. Paid through Chicago Clearing House, M. A. 3, Ill. March 8, 1910, to the Commercial National Bank. Ass't Aud. for Treasurery Dep't. March 8, 1910. C., B. & Q. R. R. Co.

467 Chicago, Burlington & Quincy Railroad Company Relief Department.

No. 70359.

No Protest. $28.00.

CHICAGO, March 1, 1910.

Pay to the order of Joseph Wagner (Certificate No. 77541) Twenty Eight Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 28 days from Feb. 1 to 28, 1910, inclusive, and is paid and accepted under the regulations of the Relief Department.

J. A. DENNEY,
Assistant Superintendent.

To the Treasurer of the C., B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchant's Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. Paid the Commercial National Bank, 6094, Chicago, Illinois, or order, 6094, all prior endorsements guaranteed March 5, 1910. First National Bank, San Diego, Cali., F. J. Belcher, Jr., Cashier. The Commercial National Bank of Chicago, Nathaniel R. Losch, Cashier. Paid March 10, 1910, through the Chicago Clearing House. Paid through the Chicago Clearing House M. A. 3 Ill. March 10, 1910. Commercial National Bank. Ass't Aud. for Treaserer. March 10, 1910. C., B. & Q. R. R. Co.

468 Chicago, Burlington & Quincy Railroad Company Relief Department.

No. 72662.

No Protest.

$31.00.

CHICAGO, April 5, '10.

Pay to the order of Joseph Wagner (Certificate No. 77541) Thirty One Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 31 days from M-rch 1 to 31, 1910, inclusive, and is paid and accepted under the regulations of the Relief Department.

J. A. DENNEY,
Assistant Superintendent.

To the Treasurer of the C., B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchant's Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. Charles E. Beauchamp. Pay to the order of any Bank or Banker, previous endorsements guaranteed. May 11th, 1910. Central National Bank, Denver, Colo., W. H. Trask, Cashier. The Commercial National Bank of Chicago, Nathaniel R. Losch, Cashier. Paid May 13, 1910, through Chicago Clearing House. Paid through Chicago Clearing House, A. M. 22 A. M. May 13, 1910. To the National City Bank of Chicago. Ass't Aud. for Treasurer- Dep't. May 13, 1910. C., B. & Q. R. R. Co.

469 Chicago, Burlington & Quincy Railroad Company Relief Department.

No. 75095.

No Protest.

$30.00.

CHICAGO, May 6, 1910.

Pay to the order of Joseph Wagner (Certificate No. 77541) Thirty Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 30 days from Apr. 1 to 30, 1910, inclusive,

and is paid and accepted under the regulations of the Relief Department.

F. N. REDFERN,
Superintendent.

To the Treasurer of the C., B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchant's Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. Pay the Commercial National Bank, 22 Chicago, Ill., or order 22, all prior endorsements guaranteed. First National Bank, Denver, Colo., F. G. Moffett, Cashier. Pay to the order of the First National Bank, S. H. Drury, Gen'l Agent, F. M. Mracham, Chief Ticket Clerk, C., B. & Q. R. R. Co. Paid through Chicago Clearing House M. A. 3 Ill. May 23, 1910. To the Commercial National Bank, As't Aud. for Treasury Dep't. May 23, 1910. C., B. & Q. R. R. Co.

470 Chicago, Burlington & Quincy Railroad Company Relief Department.

No. 76778.

No Protest. $31.00.

CHICAGO, June 3, 1910.

Pay to the order of Joseph Wagner (Certificate No. 77541) Thirty One Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 31 days from May 1 to 31, 1910. inclusive, and is paid and accepted under the regulations of the Relief Department.

F. N. REDFERN,
Superintendent.

To the Treasurer of the C., B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchant's Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. W. D. Resach. Pay the Commercial National Bank, 2309, Chicago, Ill., or order, 2309. All prior enforsements guaranteed. Star & Crescent Milling Co., R. S. Johnston, Pres. Paid through Chicago Clearing House, No. 36, June 10, 1910. To the Commercial National Bank. Ass't Aud. for Treasurery Dep't. June 10, 1910. C., B. & Q. R. R. Co.

471 Chicago, Burlington & Quincy Railroad Company Relief Department.

No. 78724.

No Protest. $30.00.

CHICAGO, Jul- 8, 1910.

Pay to the order of Joseph Wagner (Certificate No. 77541) Thirty Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 30 days from June 1 to 30, 1910, inclusive, and is paid and accepted under the regulations of the Relief Department.

W. H. WOOD,
For Superintendent.

To the Treasurer of the C., B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchant's Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. W. D. Resach. Pay the Commercial National Bank, 2309, Chicago, Ill., or order, 2309. All prior endorsements guaranteed. Star & Crescent Milling Co., R. S. Johnston, Pres. Paid through Chicago Clearing House, No. 34, July 18, 1910. To the Commercial National Bank. Ass't Aud. for Treasury Dep't. July 18, 1910. C., B. & Q. R. R. Co.

472 Chicago, Burlington & Quincy Railroad Company Relief Department.

No. 79999.

No Protest. $31.00.

CHICAGO, Aug. 3, 1910.

Pay to the order of Joseph Wagner (Certificate No. 77541) Thirty One Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 31 days from July 1 to 31, 1910, inclusive, and is paid and accepted under the regulations of the Relief Department.

J. A. DENNEY,
Assistant Superintendent.

To the Treasurer of the C., B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchant's Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. Frank B. Sadilek. S. Mullally. The Merchants Loan and Trust Co. Clearing House. Aug. 13, 1910. Dep't Paid. Paid through Chicago Clearing House, P. M. 13 P. M. Aug. 13, 1910. To the Northern Trust Company. Ass't Aud. for Treasurery Dep't. Aug. 13, 1910. C., B. & Q. R. R. Co.

473 Chicago, Burlington & Quincy Railroad Company Relief Department.

No. 81591.

No Protest. $31.00.

CHICAGO, Sept. 2, 1910.

Pay to the order of Joseph Wagner (Certificate No. 77541) Thirty One Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 31 days from Aug. 1 to 31, 1910, inclusive, and is paid and accepted under the regulations of the Relief Department.

W. B. WOOD,
For Superintendent.

To the Treasurer of the C., B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchant's Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. W. D. Resach. Pay to the order of Continental and Commercial National Bank, 3381, of Chicago, Ill., 3381. All prior endorsements guaranteed. Star & Crescent Milling Co., R. S. Johnston, Pres. Paid through Chicago Clearing House 3, Sep. 8, 1910. To the Continental and Commercial Nat'l Bank. Ass't Aud. for Treasurery Dep't. Sept. 8, 1910. C., B. & Q. R. R. Co.

474 Chicago, Burlington & Quincy Railroad Company Relief Department.

No. 85077.

No Protest. $31.00.

CHICAGO, Nov. 8, 1910.

Pay to the order of Joseph Wagner (Certificate No. 77541) Thirty One Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 31 days from Oct. 1 to 31, 1910, inclusive, and is paid and accepted under the regulations of the Relief Department.

J. A. DENNEY,
Assistant Superintendent.

To the Treasurer of the C., B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchant's Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. W. D. Resach. Pay to the order of Continental and Commercial Nat'l Bank, 3381, of Chicago, Ill., 3381. All prior endorsements guana-teed. Star & Crescent Milling Co., R. S. Johnston, Pres. Paid through the Chicago Clearing House 3, Nov. 23, 1910. To the Commercial & Continental Nat'l Bank- To the Ass't Aud. for Treaurery. Nov. 23, '90. C., B. & Q. R. R. Co.

475 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 86588.

No Protest. $50.00.

CHICAGO, Dec. 5, 1910.

Pay to the order of Joseph Wagner (certificate No. 77541, Thirty Dollars and charge to the Relief Fund. This amount is in payment of accident benefits for 30 days from Nov. 1 to 30, 1910, inclusive, and is paid and accepted under the Regulations of the Relief Department.

J. A. DENNEY,
Assistant Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchants Loan & Trust Co., Chicago.

The following endorsements appear on the back:
Joseph Wagner. Mrs. Resach. Peter Coslusser. Angelucos & Co. Prairie State Bank. Paid through Chicago Clearing House 3 Dec. 31, 1910. To the Continental & Commercial Nat'l Bank. Paid through Chicago Clearing House 3 Dec. 31, 1910. To the Continental and Commercial Nat'l Bank. Ass't Aud. for Treasury Dep't. Dec. 31, 1910. C. B. & Q. R. R. Co.

476 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 83369.

No Protest. $30.00.

CHICAGO, Oct. 4, 1910.

Pay to the order of Joseph Wagner, (Certificate No. 77541) Thirty Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 30 days from Sept. 1 to 30, 1910, inclusive, and is paid and accepted under the regulations of the Relief Department.

F. N. REDFERN,
Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchants' Loan and Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. W. D. Resach. Pay to the order of Continental and Commercial Nat'l Bank 3381 of Chicago, Ill. 3381, All prior endorsements guaranteed Star & Crescent Milling Co., R. S. Johnston, Pres. Paid through Chicago Clearing House 3, Oct. 31, 1910. To the Continental and Commercial Nat'l Bank Ass't Aud. for Treasury Dep't, Oct. 31, 1910. C. B. & Q. R. R. Co.

477 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 88601.

No Protest. $31.00.

CHICAGO, Jan. 5, 1911.

Pay to the order of Joseph Wagner, (Certificate No. 77541) Thirty one Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 31 days from Dec. 1 to 31, 1910, inclusive, and is paid and accepted under the regulations of the Relief Department.

J. A. DENNEY,
Assistant Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchants' Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. W. D. Resach. Pay to the order of Continental and Commercial Nat'l Bank 3381 of Chicago, Ill., 3381, All prior endorsements guaranteed Star & Crescent Milling Co., R. S. Johnston, Pres. Paid through Chicago Clearing House P 3 M Jan. 20, 1911 Teller No. 8, To the Continental and Commercial Nat'l Bank Ass't Aud. for Treasury Dep't, Jan. 20, 1911. C. B. & Q. R. R. Co.

478 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 90674.

No Protest. $31.00.

CHICAGO, Feb. 3, 1911.

Pay to the order of Joseph Wagner, (Certificate No. 77541) Thirty one Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 31 days from Jan. 1 to 31, 1911, inclusive, and is paid and accepted under the regulations of the Relief Department.

W. B. WOOD,
For Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchants' Loan & Trust Company, Chicago.
The following endorsements appear on the back:
Joseph Wagner. W. D. Resach. Pay to the order of Continental and Commercial Nat'l Bank 3381 of Chicago, Ill. 3381, All prior endorsements guaranteed. Star & Crescent Milling Co., R. S. Johnston, Pres. Paid through Chicago Clearing House P 3 M. Teller No. 8, To the Continental and Commercial Nat'l Bank, Ass't Aud. for Treasury Dep't. Feb. 8, 1911. C. B. & Q. R. R. Co.

479 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 92884.

No Protest. $28.00.

CHICAGO, Mar. 4, 1911.

Pay to the order of Joseph Wagner, (Certificate No. 77541) Twenty eight Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 28 days from Feb. 1 to 28, 1911, inclusive, and is paid and accepted under the regulations of the Relief Department.

J. A. DENNEY,
Assistant Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchants' Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. W. D. Resach. Pay to the order of Continental and Commercial Nat'l Bank 3381 of Chicago, Ill. 3381 All prior endorsements guaranteed Star & Crescent Milling Co., W. L. Phelps, Pres. Paid through Chicago Clearing House P 3 M Mar. 10, 1911. Teller No. 10, To the Continental and Commercial Nat'l Bank Ass't Aud. for Treasury Dep't. Mar. 10, 1911. C. B. & Q. R. R. Co.

480 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 94863.

No Protest. $31.00.

CHICAGO, Apr. 3, 1911.

Pay to the order of Joseph Wagner (Certificate No. 77541) Thirty-one Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 31 days from Mar. 1, to 31 1911, inclusive and is paid and accepted under the regulations of the Relief Department.

J. A. DENNEY,
Assistant Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchant's Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. Pay to the order of State Bank of Chicago, Hugo Ad Oldenborg. Paid through Chicago Clearing House M. A. 3, *il* Aoril 13, 1911. To the Continental and Commercial Nat'l Bank. Paid through Chicago Clearing House 18 Apr. 13, 1911. To the State Bank of Chicago.

481 Chicago, Burlington & Quincy Railroad Company, Relief Department.

No. 96526.

No Protest. $30.00.

CHICAGO, May 2, 1911.

Pay to the order of Joseph Wagner (Certificate No. 77541) Thirty Dollars, and charge to the Relief Fund. This amount is in payment of accident benefits for 30 days from Apr. 1, to 30 1911, inclusive and is paid and accepted under the regulations of the Relief Department.

W. B. WOOD,
For Superintendent.

To the Treasurer of the C. B. & Q. R. R. Co.
Payable at the Commercial National Bank or the Merchant's Loan & Trust Company, Chicago.

The following endorsements appear on the back:
Joseph Wagner. Alexias Bro. Hospital. Paid through Chicago Clearing House P. 3 M. May 10, 1911. Teller No. 9, to thr Continental and Commercial Nat'l Bank. Marshall Field & Co., Retail, Paid through Chicago Clearing House 4, May 10, 1911 to the Merchants Loan and Trust Company, Ass't Aud. for Treasury Dept., May 10, 1911. C. B. & Q. R. R. Co.

482 Mr. EVERETT: I will read this one to the jury (reading) "Chicago, Burlington & Quincy Railroad Company, Relief Department, Chicago, March 3rd, 1909, $56.00. No protest. Pay to the order of Joseph Wagner, certificate number 77541, $56.00 and charge to the Relief Department fund. This amount is in payment of accident benefits for 28 days from February 1st to 28th, 1909 inclusive, and is paid and accepted under the regulations of the Relief Department. To the treasurer of the C. B. & Q. R. R. Co., Payable at the Commercial National Bank, or the Merchants Loan & Trust Bank, Signed J. A. Denny, Assistant Superintendent."

Mr. MCSHANE: It is stamped Assistant Superintendent.

Mr. EVERETT: Yes.

Mr. MCSHANE: It is apparently by the assistant.

Mr. EVERETT: Yes. On the back appears "Joseph Wagner" and "Joseph M. Wagner" and then the bank stamps. The bank stamps are different on the different checks, gentlemen, that is, it is stamped wherever it is paid. Some were cashed one place and some another. Some in Denver.

Mr. MCSHANE: Yes, that is right.

Mr. EVERETT: But the bank stamps appear on the back.

Mr. MCSHANE: Yes.

Mr. EVERETT: I offer in evidence Exhibit 32 for identification, identified by John M. Wagner.

(Counsel hands document to Mr. McShane.)

Mr. McSHANE: That is the same thing. I do not object to that. It goes in under the same ruling.

Mr. EVERETT: I ask this be marked Defendant's Exhibit 3.

(Said paper was thereupon marked by the Reporter Defendant's Exhibit 3.)

483 The COURT: What is that?

Mr. EVERETT: It is Defendant's Exhibit 3. It reads as follows:

"Chicago, Burlington & Quincy Railway Company,
Office of the Superintendent.

Relief department. Certificate number 77541, Dated Chicago, Illinois, February 15th, 1904, Joseph Wagner swm. (That is an abbreviation for switchman, I understand) Terminal division. I send you herewith copy of the Revised Edition of the Regulations of the Relief Department of the Chicago, Burlington & Quincy Railway Company, effective March 1st, 1904. Please acknowledge receipt hereof. J. N. Redfern, Superintendent." "Received above this 18th day of February 1904. Signed Joseph Wagner."

The COURT: I did not rule on it but it may go in subject to that objection. Said exhibit is inserted on the next page following.

Mr. McSHANE: Is he superintendent of the Relief Department or of the railroad?

DEFENDANT'S EXHIBIT 3.

Chicago, Burlington & Quincy Railroad Company,
Relief Department,
Office of the Superintendent.

Certificate No. 77541.

CHICAGO, ILL., February 15, 1904.

Jos. Wagner, S. W. M., Terminal Div.:

I send you herewith a copy of the revised edition of the Regulations of the Relief Department of the Chicago, Burlington & Quincy Railway Company, effective March 1, 1904.

Please acknowledge receipt hereon.

J. N. R-DFERN,
Superintendent.

Received above this 18th day of Feb., 1904.

(Signature) JOS. WAGNER.

Witness:

——— ———.

Signature of witness required only when member can not sign his own name.

484 Mr. EVERETT: Of the railroad, I guess.

Mr. MCSHANE: The other is superintendent of the Relief Department and not of the railroad, is that right? I think the superintendent of the railroad is another man. He is of the Relief Department, I think it must be.

Mr. EVERETT: Yes, I guess so.

Mr. MCSHANE: And not of the railroad, yes that is right.

Mr. EVERETT: I offer in evidence document Exhibit 34 for identification, and ask that it be marked Defendant's Exhibit 4.

Mr. MCSHANE: Aren't you going to read that?

Mr. EVERETT: Yes. This is the application.

(Said paper was thereupon marked by the reporter Defendant's Exhibit 4.)

Mr. EVERETT: Defendant also offers in evidence supplemental application now marked Defendant's Exhibit for identification 33, and asks that it be marked Defendant's Exhibit 5.

The COURT: It may be so marked.

(Which two said documents last above referred to, being the application and supplemental application, being offered and admitted in evidence, and being marked Defendant's Exhibit 4 and Defendant's Exhibit 5, are in words and figures as follows, to-wit:)

485 R. D. 5, Issue of January, 1900.

Stamp, July 30, 1902.

Chicago, Burlington & Quincy Railway Co. Relief Department.

(1.)

Application for Membership in the Relief Fund of the Relief Department of the Chicago, Burlington & Quincy Railway Co.

To the Superintendent of the Relief Department of the Chicago, Burlington & Quincy Railway Company:

I, Joseph Wagner, of Chicago, in the county of Cook and State of
Name of Applicant in full. City or Town.
Illinois, now employed by the Chicago, Burlington & Quincy Railway Company do hereby apply for membership in the Relief Fund of the Relief Department of said Company, and consent and agree to be bound by the Regulations of said Relief Department, which Regulations I have read or have had read to me, and by any other Regulations of said Department hereafter adopted and in force during my membership, and by any agreement now or hereafter made by the said Company with any other corporation or corporations now or hereafter associated with it in the administration of their Relief Departments.

I also agree, That the said Company, by its proper agents, and in the manner provided in said Regulations, shall apply as a voluntary contribution from any wages earned by me under said employment,

the sum of Seventy five Cents ($-75/100) per month for the purpose of securing the benefits provided in the Regulations for a member of the Relief Fund of the First (1) class with additional death benefit of the first-class.

Unless I shall hereafter otherwise designate, in writing, with the approval of the Superintendent of the Relief Department, death benefit shall be payable to my wife (husband), if I am married at the time of my death; or, if I have no wife (husband) living, then to my children collectively, each to be entitled to an equal share, including, as entitled to the parent's share, the issue of any deceased child; or, if there be no children of such issue living, then to —— —— if living; and if not living, then to my father and mother jointly, or the survivor; or, if neither be living, then to my next of kin, payment in behalf of such next of kin to be made to my legal representatives; or, if there be no such next of kin, the death benefit shall lapse, and the amount thereof shall remain as a part of the Relief Fund, without claim for the same.

Any funeral or other expenses incident to my death, which shall have been paid by the Superintendent of the Relief Department, in accordance with the Regulations, shall be held to be in part payment of the said death benefit, and shall be deducted from the total amount thereof before payment to the person or persons entitled to receive the same.

Set out.

I also agree, That in consideration of the amounts paid and to be paid by said Company for the maintenance of said Relief Department, and of the guarantee by said Company of the payment of said benefits, the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims against said Company and all other companies associated therewith in the administration of their Relief Departments, for damages arising from or growing out of said injury; and further, in the event of my death no part of said death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the Superintendent of said Relief Department, of all claims against said Relief Department, as well as against said Company and all other companies associated therewith as aforesaid, arising from or growing out of my death, said releases having been duly executed by all who might legally assert such claims; and further, if any suit shall be brought against said Company or any other company associated therewith as aforesaid for damages arising from or growing out of injury or death occurring to me, the benefits otherwise payable and all obligations of said Relief Department and of said Company created by my membership in said Relief Fund, shall thereupon be forfeited without any declaration or other act by said Relief Department or said Company.

I also agree, That this application, upon approval by the Superintendent of the Relief Department, shall make me a member of the Relief Fund, on and from the date specified in such approval, and constitute a contract between myself and the said Company, and that

the same shall not be avoided by any change in the character of my service, or locality where rendered, while in the employment of said Company, nor by any change in the amounts applicable from my wages to the Relief Fund which I may hereafter consent to, and that the agreement that the above-named amounts shall be appropriated from my wages, shall apply also to any other amounts which I may agree to pay under the provisions of said Regulations, by reason of changes made as aforesaid, and shall constitute an appropriation and assignment in advance, of such portions of my wages, to the said Company in trust, for the Relief Fund, for the purpose of maintaining my membership therein, which assignment shall have precedence over any other assignment by me of my wages, or of any claim upon them on account of liabilities incurred by me.

I also agree, That my being transferred to the service of any other Company associated with said Company in the joint operation of their Relief Departments, shall operate to transfer my membership in the Relief Fund of said Company to the Relief Fund of the Company to the service of which I am transferred, and that this application and contract shall thereupon become binding between me and such other Company, the same as if originally made by me with such other Company.

I also agree, For myself and those claiming through me, to be especially bound by Regulation numbered 66, providing for final and conclusive settlement of all claims for benefits or controversies of whatsoever nature by reference to the Superintendent of the Relief Department and an appeal from his decision to the Advisory Committee.

I certify, That I am correct and temperate in my habits; that so far as I am aware, I am now in good health, and have no injury or disease, constitutional or otherwise, except as shown on the accompanying statement made by me to the Medical Examiner, which statement shall constitute a part of this application.

I also agree, That any untrue or fraudulent statement made by me to the Medical Examiner, or any concealment of facts in this application, or any attempt on my part to defraud or impose upon said Relief Fund, or my resigning from or leaving the service of the said Company, or my being relieved or discharged therefrom, shall forfeit my membership in the said Relief Fund, and all benefits, rights, or equities arising therefrom, except that such termination of my employment shall not (in the absence of any of the other foregoing causes of forfeiture) deprive me of any benefits to the payment of which I may be entitled by reason of disability beginning and reported before and continuing without interruption to and after such termination of my employment, nor of the right to continue my membership in respect of death-benefit only, as provided in said Regulations.

In witness whereof, I have signed these presents at Hawthorne, in the county of Cook, State of Illinois, this 29th day of July, A. D. 1902; this application to take effect —— —, A. D. 190–, or on such subsequent date as may be designated by said Superintendent; provided, however, that if I become disabled before said date and con-

tinue disabled beyond said date this application shall not take effect until the first day after my recovery.

The following changes made before execution:

JOS. WAGNER.
Signature of Applicant.

Witness:
CHAS. D. JONES.

The foregoing application is approved at the office of the Superintendent of the Relief Department at Chicago, in the County of Cook, State of Illinois, this 6 day of Aug., A. D. 1902, to take effect the 29 day of July, A. D. 1902.

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J. N. REDFERN,
Assistant Superintendent of the Relief Department.
JOSEPH WAGNER.

BV 77541.

Statement Made to the Medical Examiner by the Applicant.

1. What is your full name? Joseph Wagner.
2. When were you born? Aug. 4, 1873.
3. Have you ever been a member, or examined for membership, in any Relief Fund of any Railroad in the Burlington System? Yes. No.—A. B. W.
4. When and where? ——.
5. How long have you been in the service of the Company continuously? 12 years.
6. Are you married? No.
7. What is the name of your wife (husband)? ——.
8. What are the names of your children? (If married, give married names.) ——.
   Sons ——.
   Daughters ——.
9. What are the names of your parents, and brothers and sisters, now living? ——.
   Father, Casper. Mother, dead. Appendicitis.
   Brothers, Mathew, Phillip, Nicholas.
   Sisters ——.
10. If either parent or any brothers or sisters have died, what was cause of death in each case? One brother from typhoid fever—one sister infant.
11. Have either of your parents or any brothers or sisters had consumption, rheumatism, insanity, or scrofula? No.
12. Have you ever had any of the following:

Pneumonia? No.	Syphilis? No.
Pleurisy? No.	Stricture? No.
Asthma? No.	Urinary trouble? No.
Bronchitis? No.	Appendicitis? No.
Spitting blood? No.	Chronic Dyspepsia? No.

Hay Fever? No.	Dysentery? No.
Fits? No.	Hemorrhoids (piles)? No.
Dizzy or fainting spells? No.	Rupture? No.
Sunstroke? No.	Rheumatism? No.

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13. What long or serious sickness or sicknesses have you ever had? Diptheria.

14. Where and when? Chicago, Ill. 6 yrs.

15. When, where, how long, and with what were you last sick? As above.

16. What injury or injuries have you ever received? None.

17. Where and when? ——.

18. When were you last unable to work on account of injury? ——.

19. To what extent do you use intoxicating liquors? Temperate.

20. Have you now or have you ever had any disease, tumor, or ulcer, or any physical defect except as above stated? No.

I certify that my answers to the foregoing questions are recorded above in full and correctly, and that said answers are true.

Signature of Applicant: JOS. WAGNER.

Witness:
CHAS. D. JONES.

Medical Examiner's Certificate.

1. Name of applicant, Joseph Wagner. Color, W.
2. General appearance, Vigorous.
3. General development, normal.
4. Height, 5-6.
5. Weight, 156.
6. Chest measure (full inspiration), 38 inches, (full expiration), 34 inches.
7. Abdominal measure, 38 inches.
8. Sight: Right eye, 20/m; left eye, 20/m.
9. Hearing: Right ear, 10 ft.; left ear, 10 ft.

Note any defect in the—

10. Hands and arms, none.
11. Feet and legs, none.
12. Head, face and neck, none.
13. Eyes and eyelids, none.
14. Spine and joints, none.
15. Groin, none.
16. Skin, none.
17. Blood vessels, normal.

18. Heart:
Number of pulse beats, 72.
Character of pulse, regular.
Position of apex beat, normal.
Auscultation, normal.

19. Lungs:
Number of respirations, 18.
Character of respirations, ves.
Auscultation, normal.
Percussion, normal.

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20. Remarks: General intelligence, cachexiæ, etc., Good man.
21. Reason, if application is not recommended for approval, ——.

I certify that I have carefully examined the applicant named herein, and that the above is a correct description of his physical condition; and I hereby do recommend the approval of his application.
do or do not

Place and date of examination Hawthorne, Ills., 7/29 1902.

CHAS. D. JONES,
Medical Examiner.

Report of physical examination examined and application is recommended for approval.

J. A. DENNEY,
Medical Director.

M. L.

7/30/02.

[Endorsed:] Defendants' Exhibit 4. Copy. †R. D. 5, Issue Jan., 1900.

486 *Copy of Envelope Attached to Defendant Exhibit* 4.

Burlington Route.

Railway Business.

The use of this envelope to avoid payment of postage on private matters of any kind is punishable, under U. S. Postal laws, by a fine of $100.

Burlington Voluntary Relief Dept., Chicago, Ill., Oct. 9, 1902.

Joseph Wagner, R. D. 16, No. 846.
Y'd Clerk.

Duplicate.

This receipt must be signed by the member addressed.
The officer in whose care this envelope is addressed will please see that the member addressed receives the enclosed certificate of

[† In pencil in copy.]

membership, and that the envelope properly signed, is returned to the Superintendent of the Relief Department, C. B. & Q. Building, Chicago, Ill.

Received this day Certificate of Membership No. 77541, attached to a cipy of the regulations of the Relief Department of the Chicago Burlington & Quincy Railroad Company Effective November 20, 1901.

JOSEPH WAGNER.

Date, Oct. 7, 1902.

The above is a copy of an envelope and attached to Defendant's Exhibit 4.

487 DEFENDANT'S EXHIBIT 5.

R. D. 7, Issue of January, 1900. [7.]

Chicago, Burlington & Quincy Railway Co.

Relief Department.

Supplementary Application.

Stamp.
Apr. 11, 1903.

To the Superintendent of the Relief Department of the Chicago, Burlington & Quincy Railway Company:

I, Joseph Wagner, of Chicago, in the County of Cook and State
Name of Applicant in full. City or Town.
of Illinois, now employed by the Chicago, Burlington & Quincy Railway Company, and a member of the Relief Fund of the Relief Department thereof, by virtue of my former principal application, under and subject to the conditions recited in said principal application and upon the terms thereof, unless, and only so far as, herein modified, do hereby make this supplementary application for the following, namely: To change my membership in said Relief Fund from 1 class with no additional death benefits of the first class and to 4th class with no additional death benefits of the first class; my contribution, after such change is made, to be at the rate of Three Dollars ($3.00/100) per month;—this application to take effect on the First (1) day of April A. D. 1903, or on such subsequent date as may be designated by said Superintendent; provided that on that date I am not absent from duty by reason of disability; otherwise this supplementary application to take effect upon my recovery from such disability.

I certify, That I am correct and temperate in my habits; that; so, far as I am aware, I am now in good health, and have no injury or disease, constitutional or otherwise, except as shown in the accompanying statement made by me to the Medical Examiner, which statement shall constitute a part of this application.

I hereby agree, That any untrue or fraudulent statement made by me to the Medical Examiner, or any concealment of facts in this application, shall make this supplementary application void and of no effect.

In Witness Whereof, I have signed these presents at Chicago, in the county of Cook, State of Illinois, this First (1) day of April, A. D. 1903.

The following changes made before execution:

JOS. WAGNER.
Signature of Applicant.

Witness:
C. D. JONES.

The foregoing supplementary application is approved at the office of the Superintendent of the Relief Department at Chicago, in the county of Cook, State of Illinois, this 23 day of Apr., A. D. 1903, to take effect the 1 day of April A. D. 1903.
77541.

F. C. BARTLETT,
Superintendent of the Relief Department.

JOSEPH WAGNER.
No previous disability (stamped).

Old acc't. O. K.
Sick Days, —.
Sheet *h*.

Chicago, Burlington and Quincy Railway Co.

R. D. 7, Issue of March, 1904.

Supplementary Application, Relief Department.

Statement Made to the Medical Examiner by the Applicant.

1. What is your full name? Joseph Wagner.
2. When were you born? Aug. 4, 1873.
3. If either parent or any brothers or sisters have died, what was cause of death in each case? Mother dead, from appendicitis, no others dead except one brother died from typhoid fever.
4. Have either of your parents or any brothers or sisters had consumption, rheumatism, insanity, or scrofula? No.
5. Have you ever had any of the following:

Pneumonia? (Lung Fever) No.
Pleurisy? No.
Asthma? No.
Bronchitis? No.
Spitting of blood? No.
Hay Fever? No.
Fits? No.
Dizzy or fainting spells? No.

Sunstroke? No.
Syphilis? No.
Stricture? No.
Urinary trouble? No.
Appendicitis? No.
Chronic Dyspepsia? No.
Dysentery? No.
Hemorrhoids (piles)? No.
Rupture? No.
Rheumatism? No.

6. What long or serious sickness or sicknesses have you ever had? Grippe.

7. Where and when? Chicago, Ill., 4 yrs. ago.

8. When, where, how long, and with what were you last sick? As above nine days.

9. What injury or injuries have you ever received? None.

10. Where and when? —.

11. When were you last unable to work on account of injury? —.

12. To what extent do you use intoxicating liquors? Temperate.

13. Have you now or have you ever had any disease, tumor, or ulcer, or any physical defect except as above stated? No.

I certify that my answers to the foregoing questions are recorded above in full and correctly, and that said answers are true.

Signature of Applicant,

JOS. WAGNER.

Witness,
C. D. JONES.

Medical Examiner's Certificate.

1. Name of applicant, Jos. Wagner. Color, W.
2. General appearance, vigorous.
3. General development, —.
4. Height, 5-5.
5. Weight, 165.
6. Chest measure (full inspiration), 39 inches, (full expiration), 35 inches.
7. Abdominal measure, 38 inches.
8. Sight: Right eye 20/20; left eye, 20/20.
9. Hearing: Right ear, 10 ft.; left ear, 10 ft.

Note any defect in the—

10. Hands and arms, none.
11. Feet and legs, none.
12. Head, face and neck, none.
13. Eyes and eyelids, none.
14. Spine and joints, none.
15. Groin, none.
16. Skin, none.
17. Blood vessels, none.

18. Heart: Number of pulse beats, 72; Character of pulse, regular; Position of apex beat, normal; Auscultation, normal.
19. Lungs: Number of respirations, 18; Character of respirations, ves-cular; Auscultation, normal; Percussion, normal.
20. Remarks: General intelligence, cachexiæ, etc., good; never.
21. Reason, if application is not recommended for approval; —.
I certify that I have carefully examined the applicant named herein, and that the above is a correct description of his physical condition; and I hereby do recommend the approval of his application.

do or do not

Place and date of examination, Chicago, Ill., 4/4/1903.

C. D. JONES,
Medical Examiner.

4/4/03.

Report of physical examination examined and application is recommended for approval.

H. F. KORS,
Medical Director.

488 Copy of envelope attached to Defendants' Exhibit 5:

Burlington Route.

Railway Business.
The use of this envelope
to avoid payment of postage
on private matter of any kind
is punishable, under U. S.
Postal laws, by a fine of $100.

Burlington Voluntary
Relief Dep't, Chicago,
Ill., Apr. 29, 1903.

Joseph Wagner, R. D. 16. No. 3802.

S. W. M.

Sup.

This receipt must be signed by the member addressed.
The officer in whose care this envelope is addressed will please see that the member addressed receive sthe enclosed certificate of membership, and that the envelope, properly signed, is returned to the Superintendent of the Relief Department, C. B. & Q. Building, Chicago, Ill.
Received this day Certificate *fo* Membership No. 77541 attached to a copy *fo* the Regulations of the Relief Department of the Chicago, Burlington & Quincy Railway Company, effective November 20, 1901.

Signature: JOS. WAGNER.

Date—April 28.

The above is copy of an envelope attached to Defendants' Exhibit 5.

489 Mr. EVERETT: I offer the statement of W. W. Dorsey, identified as Defendants' Exhibit 1 for identification, and ask that it be marked Defendants' Exhibit 6.

(Said paper was thereupon marked by the Reporter Defendants' Exhibit 6, and same was read to the jury by Mr. Everett.)

Mr. EVERETT: I also offer statement of the witness F. Coleman which is identified as Exhibit H, and I ask that it be marked Defendants' Exhibit 7.

(Said statement thereupon marked by the Reporter Defendants' Exhibit 7, and portion- of same were read to the jury by Mr. Everett.)

Mr. EVERETT: I also offer Exhibit marked Defendants' Exhibit 6 for identification, which is the statement of John Connell, the switchman, and ask that it be marked Defendants' Exhibit 8.

(Said statement was thereupon marked by the Reporter Defendants' Exhibit 8, and portions of the same were read to the jury by Mr. Everett.)

Which said statements last above referred to being statements of W. W. Dorsey, F. Coleman, and J. Connell, being marked Defendants' Exhibits 6, 7, and 8, being offered and admitted in evidence without objection, are in words and figures as follows, to-wit:

490 DEFENDANTS' EXHIBIT 6.

Chicago, Burlington & Quincy Railroad Company, Personal Injury Report.

Instructions.—This report must be made in triplicate and the three copies sent by the person making them to the Division Superintendent, who will promptly submit one to the General Manager and two to the General Superintendent, who will, not later than the 5th of the following month, transmit one copy of each report relating to casualties of the preceding month to the General Auditor, Chicago, Ill. Each question must be answered. If they do not apply, draw line through space left for answer. If you cannot give correct answer, so state after the question. Seperate report must be made for each person injured. Where a number of these reports are made to cover persons in any one accident they should be attached together.

Name, occupation and residence of person injured: Joseph Wagner, Switchaman C. B. & Q. Ry.

If an employe of this company, in what class of service? Switchman.

Was he on duty at the time of accident? Yes.

If Postal clerk, express messenger, Pullman employe, etc., which? —.

Was he on duty at time of accident? —.

Was he a member of the Relief Department? Yes.

Class? Don't know.

A. D. B. 666.

Ex. Acct. D. B.

If a passenger where did he board the train? No.
What was his destination? —.
If neither an employe of this company, postal clerk, employe of an outside company (as Express Co., Pullman Co., etc.) nor passenger, was he trespassing on the company's property or not? —.

NOTE.—A person stealing a ride on a train or being on right of way (except at public crossings, station grounds, etc.,) is to be considered a trespasser.

491 Date of Accident: Dec. 15.
Hour of day or night: 11 A. M.
Condition of weather: Clear.
Exact locality: 18th & Grove St-.
Nature and extent of injuries sustained: Struck by Semaphore post and hurt back.
Did he die within 24 hours? No.
If an employe, is it probable that during ten days following accident he was unable to perform duties for more than 3 days in the aggregate? —.
Here state fully and in detail just how injury was received, giving every fact known to you which shows how accident happened, and who is to blame therefor: While shoving 5 Great Northern express cars east on curve to Western Indiana Ry. from Fort Wayne tracks, Jos. Wagner in charge of train was struck by semaphore while hanging on side car third one from engine on R. side of car.
If an employe of this company, and injury resulted from his inexperience or ignorance, or to excessive fatigue, fill out the following table so far as possible.
Age: About 35.
Hours on duty at time of accident: 4 hrs.
Years in service of this company: Don't know.
Years in present position: 6 yrs.
Hours of lay off before going on duty: 12.
In the following table mark opposite the proper item to designate the class of accident:

To Railroad Company's Employes.

Coupling or uncoupling.
Collissions.
Derailments.
Parting of trains.
Locomotives or cars breaking down.
Falling from trains, locomotives or cars.
Jumping on or off trains, locomotives or cars.
492 Struck by trains, locomotives or cars.
Overhead obstructions.
Handling traffic.
Handling tools, machinery, etc.
Getting on or off locomotives or cars at rest.
Other causes.

To All Other Persons.

Collisions.
Derailments.
Parting of trains.
Locomotives or cars breaking down.
Falling from trains, locomotives or cars.
Jumping on or off trains, locomotives or cars
Struck by trains, locomotives or cars.
At highway crossings.
At stations.
At other points along track.
Other causes: Struck by semaphore.

NOTE.—If "other causes", explain in detail. If accident was due to catching foot in frog, switch or guard rail, state whether safety blocks were used and what kind.

Estimate damage to cars, engines, track, bridges and signals from accident in which this person was injured, $—.
Age of injured person: 35.
Married or single: Single.
What family if any: —.
Where and in whose care was injured person left: Care of towerman 18th & Grove St-.
Was a physician called? No.
If so, give his name and address: —.
State who called him and by whose authority he was called: —.
Freight, passenger train or light engine? Switch.
493 Train number and direction: —.
Engine No.: 1516.
Conductor: Joe Wagner.
Engineman: W. W. Dorsey.
Fireman: W. Clark.
Baggageman: —.
Brakeman: J. Connell.
Brakeman: F. Coleman.
Give names and addresses of all other persons who witnessed the accident, and especially those who are not in company's service:

Names.	Occupation.	Addresses.
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

If a train, how many cars? 5 cars.
On how many cars were air brakes coupled up? 5.
What was speed at time of accident? 6 miles per hour.
Was train on time? —.
State your location with reference to place of accident and what you were doing: —.

Were you an eye witness to the accident? Yes.
What was injured person doing when hurt? In employ of company, hanging on cars.
What distance did engine or cars run after the accident? 2 car lengths.
If injured in coupling or uncoupling, state kind and condition of drawbars, and when you examined them? —.
If injured in coupling or uncoupling, were cars being coupled or uncoupled attached to engine or not? —.
If attached to engine, who giving signals? —.
What signals were given? Signal from Semaphore.
State how engine was moved, whether slowly, carefully, and in accordance with such signals? Carefully.
If injury resulted in defect of t-ack, planking or crossing, depot platform, cars machinery, or other appliances, describe fully the defect and how you know such defect existed? Semaphore to- close to track.
Give initials and numbers of cars and engine immediately connected with this injury: Engine 1516.
494 What signals or warnings were given, and by whom? John Connell.
Was whistle sounded, and when and where? —.
Was headlight burning? No.
Was bell ringing at the time of the accident, and how long had it been ringing? Yes.
Was it an automatic bell? Yes.
What did injured person say as to cause of accident, and extent of injury, and who heard him say it? —.
Did accident happen on street crossing? No.
If accident happened on crossing, was there a flagman at gate or crossing? —.
If gates, were they opened or closed? —.
How was crossing lighted? —.
What did flagman do to prevent accident? —.
What was there to prevent injured person from seeing train? —.
State what effort was made by employes injured persons, or any one else, to prevent accident? —.
Signature of person making this report: W. W. Dorsey.
Occupation and address: Engineer C. B. & Q. 692 S. Calp Av. Ch'go.
Date of Report: Dec. 15, 1908.

NOTE.—This report must be signed by person making the report and not by some one for him. If signature by mark (x), have mark witnessed.

Witness: —.

495 Copy of Defendant's Exhibit 7.

DEFENDANTS' EXHIBIT 7.

Chicago, Burlington & Quincy Railroad Company.

Personal Injury Report.

Instructions: This report must be made in triplicate and the three copies sent by the person making them to the Division Superintendent, who will promptly submit one to the General Manager and two to the General Superintendent, who will, not later than the 5th of the following month, transmit one copy of each report relating to casualties of the preceding month to the General Auditor, Chicago Ill. Each question must be answered. If they do not apply, draw line through space left for answer. If you cannot give correct answer, so state after the question. Separate report must be made for each person injured. Where a number of these reports are made to cover persons in any one accident they should be attached together.

Name, occupation and residence of person injured, Joseph Wagner, 1101 Central Park Av.

If an employe of this company, in what class of service? Yes switchman.

Was he on duty at the time of accident? ——.

If Postal clerk, express messenger, Pullman employe, etc., which? ——.

Was he on duty at time of accident? ——. Was he a member of the Relief Department ——. Class ——. A. D. B. —— ——. Ex. Acct. D. B. ——.

If a passenger where did he board the train ——.

What was his destination? ——. If neither an employe of this company, postal clerk, employe of an outside company (as Express Co., Pullman Co., etc.) nor passenger, was he trespassing on the company's property or not? ——.

NOTE.—A person stealing a ride on a train or being on right of way (except at public crossings, station grounds, etc.,) is to be considered a trespasser.

496 Date of Accident 12/15/1908. Hour of day or night 11 A. M.

Condition of weather Cloudy.

Exact locality Grove St. East of P. F. W. C.

Nature and extent of injuries sustained Crossing.

Did he die within 24 hours? ——. If an employe, is it probable that during ten days following accident he was unable to perform duties for more than 3 days in the aggregate? ——.

Here state fully and in detail just how injury was received, giving every fact known to you which shows how accident happened, and

who is to blame therefor We were shoving around Grove St. 5 cars of silk and he rode between the first and second car and was struck with semaphore post hurting his side and back.

If an employe of this company, and injury resulted from his inexperience or ignorance, or to excessive fatigue, fill out the following table so far as possible.

Age. ——. Hours on duty at time of accident ——.

Years in service of this company ——.

Years in present position ——. Hours of lay off before going on duty ——.

In the following table mark opposite the proper item to designate the class of accident.

To Railroad Company's Employes.

Coupling or uncoupling
Collissions
Derailments
Parting of trains
Locomotives or cars breaking down
Falling from trains, locomotives or cars
Jumping on or off trains, locomotives or cars.
497 Struck by trains, locomotives or cars
Overhead obstructions
Handling traffic
Handling tools, machinery, etc.
Getting on or off locomotives or cars at rest
Other causes ——

To All Other Persons.

Collisions
Derailments
Parting of trains
Locomotives or cars breaking down
Falling from trains, locomotives or cars
Jumping on or off trains, locomotives or cars
Struck by trains, locomotives or cars
At highway crossings
At stations
At other points along track
Other causes ——.

NOTE.—If "other causes", explain in detail. If accident was due to catching foot in frog, switch or guard rail, state whether safety blocks were used and what kind.

Estimate damage to cars, engines, track, bridges and signals from accident in which this person was injured, $——.

Age of injured person ——. Married or single Single.

What family if any ——.

Where and in whose care was injured person left Taken to St. Anthony Hospital.

Was a physician called ——. If so, give his name and address. ——.

State who called him and by whose authority he was called ——.

Freight, passenger train or light engine ——.

498 Train number and direction —— Engine No. ——.

Conductor J. Wagner. Engineman W. Dorsey.

Fireman ——. Baggageman ——.

Brakeman F. Coleman. Brakeman J. Connell.

Give names and addresses of all other persons who witnessed the accident, and especially those who are not in company's service:

Names.	Occupation.	Addresses.
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

If a train, how many cars ——. On how many cars were air brakes coupled up? ——. What was speed at time of accident ——. Was train on time? ——.

State your location with reference to place of accident and what you were doing ——.

Were you an eye witness to the accident No.

What was injured person doing when hurt? Riding between first and second car-.

What distance did engine or cars run after the accident? ——. If injured in coupling or uncoupling, state kind and condition of drawbars, and when you examined them? ——.

If injured in coupling or uncoupling, were cars being coupled or uncoupled attached to engine or not? ——.

If attached to engine, who giving signals? ——.

What signals were given? ——.

State how engine was moved, whether slowly, carefully, and in accordance with such signals? ——.

If injury resulted in defect of t-ack, planking or crossing, depot platform, cars machinery, or other appliances, describe fully the defect and how you know such defect existed? ——.

Give initials and numbers of cars and engine immediately connected with this injury G. N. 1664.

499 What signals or warnings were given, and by whom? ——.

Was whistle sounded, and when and where ——.

Was headlight burning? ——.

Was bell ringing at the time of the accident, and how long had it been ringing? ——.

Was it an automatic bell? ——.

What did injured person say as to cause of accident, and extent of injury, and who heard him say it? ——.

Did accident happen on street crossing? ——.

If accident happened on crossing, was there a flagman at gate or crossing? ——.

If gates, were they opened or closed? ——.

How was crossing lighted? ——.
What did flagman do to prevent accident? ——.
What was there to prevent injured person from seeing train? ——. State what effort was made by employes, injured persons, or any one else, to prevent accident? ——.
Signature of person making this report ——.
Occupation and address: F. Coleman 6820 Johnston St.
Date of Report ——.

NOTE.—This report must be signed by person making the report and not by someone for him. If signature by mark (x), have mark witnessed.

Witness: —— ——.

500 Copy of Defendant-' Exhibit 8.

DEFENDANTS' EXHIBIT 8.

Chicago, Burlington & Quincy Railroad Company.

Personal Injury Report.

INSTRUCTIONS.—This report must be made in triplicate and the three copies sent by the person making them to the Division Superintendent, who will promptly submit one to the General Manager and two to the General Superintendent, who will, not later than the 5th of the following month, transmit on*w* copy of each report relating to casualties of the preceding month to the General Auditor, Chicago, Ill.* Each question must be answered. If they do not apply, draw line through space left for answer. If you cannot give correct answer, so state after the question. Separate report must be made for each person injured. Where a number of these reports are made to cover persons in any one accident they should be attached together.

Name, occupation and residence of person injured, Joseph Wagner, Switchman.

If an employe of this company, in what class of service? Switching.

Was he on duty at the time of accident? ——.

If Postal clerk, express messenger, Pullman employe, etc., which? ——.

Was he on duty at time of accident? Yes. Was he a member of the Relief Department? Yes. Class ——, A. D. B. —— —— Ex. Acct. D. B. ——.

If a passenger where did he board the train ——.

What was his destination? ——. If neither an employe of this company, postal clerk, employe of an outside company (as Express Co., Pullman Co., etc.) nor passenger, was he trespassing on the company's property or not? ——.

NOTE.—A person stealing a ride on a train or being on right of way (except at public crossings, station grounds, etc.,) is to be considered a trespasser.

501 Date of Accident Dec. 15, 1908. Hour of day or night day 11 A. M.

Condition of weather Cloudy.

Exact locality ——.

Nature and extent of injuries sustained his back and side.

Did he die within 24 hours? No. If an employe, is it probable that during ten days following accident he was unable to perform duties for more than 3 days in the aggregate? ——.

Here state fully and in detail just how injury was received, giving every fact known to you which shows how accident happened, and who is to blame therefor. While crossing from the Fort Wayne tracks with 5 cars to the Western Indiana tracks Jos. Wagner was struck by semaphore post. Knock- off express car 1664 N. P. I saw him fall. I and the engineer Dorsey picked him up and put him in care of Fort Wayne Bridge tender. Later on Patrol wagon took him to St. Anthony Hospital.

If an employe of this company, and injury resulted from his inexperience or ignorance, or to excessive fatigue, fill out the following table so far as possible.

Age. 31. Hours on duty at time of accident 4 hrs.

Years in service of this company ——.

Years in present position ——. Hours of lay off before going on duty ——.

In the following table mark opposite the proper item to designate the class of accident.

To Railroad Company's Employes.

Coupling or uncoupling
Collissions
Derailments
Parting of trains
Locomotives or cars breaking down
Falling from trains, locomotives or cars
Jumping on or off trains, locomotives or cars.
502 Struck by trains, locomotives or cars
Overhead obstructions
Handling traffic
Handling tools, machines, etc.,
Getting on or off locomotives or cars at rest
Other causes ——.

To All Other Persons.

Collisions
Dertailments
Parting of trains
Locomotives or cars breaking down
Falling from trains, locomotives or cars
Jumping on or off trains, locomotives or cars
Struck by trains, locomotives or cars
At highway crossings

At stations
At other points along track
Other causes: Struck by semaphore post.

NOTE.—If "other causes," explain in detail. If accident was due to catching foot in frog, switch or guard rail, state whether safety blocks were used and what kind.

Estimate damage to cars, engines, track, bridges and signals from accident in which this person was injured, $——.
Age of injured person 31. Married or single Single.
What family if any ——
Where and in whose care was injured person left Fort Wayne Bridge Tender.
Was a physician called No. If so, give his name and address. ——.
State who called him and by whose authority he was called ——.
Freight, passenger train or light engine ——.
503 Train number and direction ——. Engine No. 1516.
Conductor Jos. Wagner. Engineman Wm. Dorsey.
Fireman —— ——, Baggageman —— ——.
Brakeman J. Connell. Brakeman F. Coleman.
Give names and addresses of all other persons who witnessed the accident, and especially those who are not in company's service:

Names.	Occupation.	Addresses.
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

If a train, how many cars? 5. On how many cars were air brakes coupled up? 5. What was speed at time of accident? 6 miles per hr. Was train on time? ——.
State your location with reference to place of accident and what you were doing on foot board eng.
Were you an eye witness to the accident yes.
What was injured person doing when hurt? Standing on side of car.
What distance did engine or cars run after the accident? 2 car lengths.
If injured in coupling or uncoupling, state kind and condition of drawbars, and when you examined them? ——.
If injured in coupling or uncoupling, were cars being coupled or uncoupled attached to engine or not? ——.
If attached to engine, who giving signals? ——.
What signals were given? To stop.
State how engine was moved, whether slowly, carefully, and in accordance with such signals? Yes.
If injury resulted in defect of t-ack, planking or crossing, depot

platform, cars machinery, or other appliances, describe fully the defect and how you know such defect existed? ——.

Give initials and numbers of cars and engine immediately connected with this injury. Express Car 1664 N. P.

504 What signals or warnings were given, and by whom? J. Connell.

Was whistle sounded, and when and where ——.

Was headlight burning? No.

Was bell ringing at the time of the accident, and how long had it been ringing? Yes.

Was it an automatic bell? Yes.

What did injured person say as to cause of accident, and extent of injury, and who heard him say it? He did not say cause.

Did accident happen on street crossing? ——.

If accident happened on crossing, was there a flagman at gate or crossing? ——.

If gates, were they opened or closed? ——.

How was crossing lighted? ——.

What did flagman do to prevent accident? ——.

& ——.

What was there to prevent injured person from seeing train? ——. State what effort was made by employes injured persons, or any one else, to prevent accident? ——.

Signature of person making this report John Connell, Switchman.

Occupation and address: 387 East 23 st.

Date of Report Dec. 15, 1908.

NOTE.—This report must be signed by person making the report and not by some one for him. If signature by mark (x), have mark witnessed.

Witness

—— ——.

505 The COURT: As I understand, there is no objection to those statements.

Mr. MCSHANE: No.

The COURT: That is what I understood. If there is no objection they may be admitted.

Mr. MCSHANE: No, there was no objection.

The COURT: Very well, you may proceed, Mr. Everett, if you have anything more.

Mr. EVERETT: No, I think that is all of those that I have to offer.

The COURT: Very well, then. I suppose we might as well adjo-rn now.

Mr. EVERETT: Yes. Does the court wish to adjo-rn now, does your Honor wish to adjo-rn now?

The COURT: Yes, if you are through with those. Did you say you were through with those?

Mr. EVERETT: Yes.

The COURT: Gentlemen of the jury, we will suspend now until tomorrow morning at ten o'clock. You will observe the instructions heretofore give- you by the court. Be in your places tomorrow morning at ten o'clock sharp. We will take a recess gentlemen, until that time, until ten o'clock.

Whereupon adjournment was taken to ten o'clock next day, Thursday, May 18th, 1911.

THURSDAY, May 18th, 1911—10:00 o'clock a. m.

Court met pursuant to adjournment.

Present same as before.

506 Mr. EVERETT: There is one more statement that I desire to offer in evidence, that is the statement of John Wagner which has been identified as Exhibit 35. I ask the reporter to mark it now "Defendant's Exhibit 9."

(Said statement was thereupon marked by the reporter "Defendant's Exhibit 9.")

Mr. MCSHANE: Will you let me see it, please?

(Statement handed counsel.)

Mr. MCSHANE: I object to one thing here, your Honor.

(The following proceedings occurred out of the hearing of the jury.)

Mr. MCSHANE: I object to one thing here, your Honor, the question of the ownership of the track. "Struck by post on Western Indiana tracks." That is *not* contrary to anything that this man said. He did not pretend to testify who was the owner of the track, or what track, it was on. I object to that part of the statement.

The COURT: Well, you have a right to put him on the stand and get any explanation that you care to, if you care to in regard to that.

Mr. MCSHANE: I do not think the recital there is competent, it is not in the way of impeachment.

The COURT: The motion was overruled, as to the——

Mr. MCSHANE: They objected to him telling about the ownership of the track.

The COURT: Yes, I know, as to the introduction of this, in regard to the question of impeachment, it was overruled.

507 Mr. MCSHANE: I am perfectly willing that it all should go in, that he may read it all, except where he says that it was on the Western Indiana tracks. It says here "I was struck by a semaphore post on the Western Indiana track." I object to that going in; that is not in contradiction of anything that he said, and it is, from his *won* testimony, it must be hearsay as to whose tracks those were.

Mr. EVERETT: We are entitled to the statement he made, in reference to the accident.

The COURT: The motion will be overruled.

Mr. MCSHANE: Exception.

To which ruling of the court plaintiff then and there duly excepted.

Which said statement of John Wagner, last above referred to, being offered and admitted in evidence, being marked by the reporter as "Defendant's Exhibit 9" and the same is in the words and figures following, to-wit:

508 Copy — Defendant's Exhibit 9.

DEFENDANT'S EXHIBIT 9.

Chicago, Burlington & Quincy Railroad Company.

Personal Injury Report.

Instructions.—This report must be made in triplicate and the three copies sent by the person making them to the Division Superintendent, who will promptly submit one to the General Manager and two to the General Superintendent, who will, not later than the 5th of the following month, transmit one copy of each report relating to casualties of the preceding month to the General Auditor, Chicago, Ill. Each question must be answered. If they do not apply, draw line through space left for answer. If you cannot give correct answer, so state after the question. Seperate report must be made for each person injured. Where a number of these reports are made to cover persons in any one accident they should be attached together.

Name, occupation and residence of person injured, Joseph Wagner, Switchman, 1101 S. Central Park Avenue.

If an employe of this company, in what class of service? Switching Dept.

Was he on duty at the time of accident? Yes.

If Postal clerk, express messenger, Pullman employe, etc., which? ——.

Was he on duty at time of accident? Yes. Was he a member of the Relief Department? Yes. Class 4th A. D. B. No. Ex. Acct. D. B. ——.

If a passenger where did he board the train ——.

What was his destination? ——. If neither an employe of this company, postal clerk, employe of an outside company (as Express Co., Pullman Co., etc.) nor passenger, was he trespassing on the company's property or not? Not a trespasser.

NOTE.—A person stealing a ride on a train or being on right of way (except at public crossings, station grounds, etc.,) is to be considered a trespasser.

509 Date of Accident Dec. 15, 1908. Hour of day or night 11 A. M.

Condition of weather Clear.

Exact locality W. and I. on Crossover.

Nature and extent of injuries sustained Pelvis bone fractured and puncture of Bladder.

Did he die within 24 hours? ——. If an employe, is it probable that during ten days following accident he was unable to perform duties for more than 3 days in the aggregate? ——.

Here state fully and in detail just how injury was received, giving every fact known to you which shows how accident happened, and who is to blame therefor I was going to the Erie Yard 51st Street Via P. F. W. & C. with 5 G. Northern Baggage Cars loaded with silk when crossing on Western Indiana tracks to go to Erie Yards at 51st Street was struck by semaphore post on Western Indiana tracks.

If an employe of this company, and injury resulted from his inexperience or ignorance, or to excessive fatigue, fill out the following table so far as possible:

Age 36. Hours on duty at time of accident ——.

Years in service of this company 19 yrs.

Years in present position 6 yrs. Hours of lay off before going on duty ——.

In the following table mark opposite the proper item to designate the class of accident.

To Railroad Company's Employes.

Coupling or uncoupling
Collissions
Derailments
Parting of trains
Locomotives or cars breaking down
Falling from trains, locomotives or cars
Jumping on or off trains, locomotives or cars.
510 Struck by trains, locomotives or cars
Overhead obstructions
Handling traffic.
Handling tools, machinery, etc.,
Getting on or off locomotives or cars at rest
Other causes ——.

To All Other Persons.

Collisions
Derailments
Parting of trains
Locomotives or cars breaking down
Falling from trains, locomotives or cars
Jumping on or off trains, locomotives or cars
Struck by trains, locomotives or cars
At highway crossings
At stations
At other points along track
Other causes ——.

NOTE.—If "other causes," explain in detail. If accident was due to catching foot in frog, switch or guard rail, state whether safety blocks were used and what kind.

Estimate damage to cars, engines, track, bridges and signals from accident in which this person was injured, $——.

Age of injured person 37. Married or single Single.

What family if any Father & 2 Brothers.

Where and in whose care was injured person left taken to Saint Anthony.

Was a physician called ——. If so, give his name and address. ——.

State who called him and by whose authority he was called ——.

Freight, passenger train or light engine ——.

511 Train number and direction ——. Engine No. 1512.

Conductor —— ——. Engineman —— ——.

Fireman —— ——. Baggageman —— ——.

Brakeman —— ——. Brakeman —— ——.

Give names and addresses of all other persons who witnessed the accident, and especially those who are not in company's service:

Names.	Occupation.	Addresses.
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

If a train, how many cars? ——. On how many cars were air brakes coupled up? ——. What was speed at time of accident? ——. Was train on time? ——.

State your location with reference to place of accident and what you were doing I was on the east of the last car G. N. 1655.

Were you an eye witness to the accident? Yes.

What was injured person doing when hurt? I was riding on the last car in the train G. N. 1655.

What distance did engine or cars run after the accident? ——. If injured in coupling or uncoupling, state kind and condition of drawbars, and when you examined them? ——.

If injured in coupling or uncoupling, were cars being coupled or uncoupled attached to engine or not? ——.

If attached to engine, who giving signals? ——.

What signals were given? ——

State how engine was moved, whether slowly, carefully, and in accordance with such signals? ——.

If injury resulted in defect of track, planking or crossing, depot platform, cars machinery, or other appliances, describe fully the defect and how you know such defect existed? The semaphore post is to- close to cross over track.

Give initials and numbers of cars and engine immediately connected with this injury. Engine 1516. G. N. 1655.

512 What signals or warnings were given, and by whom? None given.

Was whistle sounded, and when and where? No.

Was headlight burning? Daylight.

Was bell ringing at the time of the accident, and how long had it been ringing? Don't know.

Was it an automatic bell? Yes.

What did injured person say as to cause of accident, and extent of injury, and who heard him say it? I said I was struck by semaphore post.

Did accident happen on street crossing? No.

If accident happened on crossing, was there a flagman at gate or crossing? ——.

If gates, were they opened or closed? ——.

How was crossing lighted? ——.

What did flagman do to prevent accident? ——.

What was there to prevent injured person from seeing train? ——. State what effort was made by employes injured persons, or any one else, to prevent accident? If this semaphore post had been the proper distance from tracks accident would not have occurred.

Signature of person making this report Joseph Wagner.

Occupation and address: Switchman, 1101 S. Central Park Av.

Date of Report Jan. 5th, 1909.

NOTE.—This report must be signed by person making the report and not by some one for him. If signature by mark (x), have mark witnessed.

Witness:

—— ——.

513 (Mr. Everett thereupon proceeded to read portions of the statement marked "Defendant's Exhibit 9," to the jury.)

Mr. McSHANE: Now, the only part he has read is not by way of contradiction. I specially object to that going in again, as it is not in contradiction to anything this witness has testified to. He testified he did not know who owned the track.

Mr. EVERETT: I object to argument of the matter when the court has passed on it.

Mr. McSHANE: Wait, wait.

Mr. EVERETT: I won't wait, wait. There is only one object he can have in making this objection before the court, and that is to make a speech. The court has ruled on it, and admitted it in evidence.

Mr. McSHANE: I am speaking to the court.

Mr. EVERETT: I object to any argument on it.

Mr. McSHANE: It is under the guise of a statement of the other things that were said to be competent, that is the way, if it goes in at all, there is only one thing that I object to.

Mr. EVERETT: No. I offer the whole thing.

Mr. McSHANE: That of itself is not contradictory. That of itself must be mere hearsay. I object to it, it is not in conflict with anything that the witness said. He don't know anything about the ownership of the track.

Mr. EVERETT: I take an exception to the remarks of counsel.

To which remarks by counsel for plaintiff, the defendant, by its counsel, then and there duly excepted.

514 Mr. McSHANE: I move to strike it out your Honor.

The COURT: Motion denied.

Mr. McSHANE: Exception.

To which ruling of the court, the plaintiff, by his counsel, then and there duly excepted.

Mr. McSHANE: Mr. Everett, let me see that a minute.

(Statement handed counsel for plaintiff.)

The COURT: I will say, however—let me see that just a moment.

(Statement handed to the court.)

Mr. McSHANE: It is not his writing at all.

The COURT: Do you say that is not his writing.

Mr. EVERETT: He signed it.

Mr. McSHANE: Not his writing, his signature to it.

The COURT: Not his writing, but his signature to it.

Mr. McSHANE: It was written in the hospital by somebody.

Mr. EVERETT: I am going to prove that by the man who was there and wrote it.

Mr. McSHANE: I object to that part of it.

Mr. EVERETT: It is a written statement signed by him, which he has acknowledged on the witness stand.

The COURT: I do not know, however, that it is exactly competent in this. You might read that printed portion.

Mr. EVERETT: I have introduced the whole statement. Just for brevity, I have omitted reading it, that is all. I have offered the whole thing.

Mr. McSHANE: He has emphasized that which he thought was important. I object to it again, on the ground that his writing was not competent; it is necessarily hearsay, and the court did not permit him to testify who owned the tracks or who did not. It is not in contradiction of anything that Wagner testified to on the stand.

The COURT: Do you intend to introduce the documents?

Mr. EVERETT: This whole document is offered as his statement that he made.

515 The COURT: That is, your reading of it.

Mr. EVERETT: No, my reading is only a portion. I will read the whole thing if he wants me to, but there is nothing in the other part that has any material bearing.

Mr. McSHANE: Nothing that would help you.

Mr. EVERETT: Yes, I am looking for things that help me, I do not deny it.

The COURT: If he is not going to put in the whole thing, objection sustained.

Mr. EVERETT: I do not understand that is the objection.

Mr. McSHANE: I did not ask them to read it all. If it goes in.

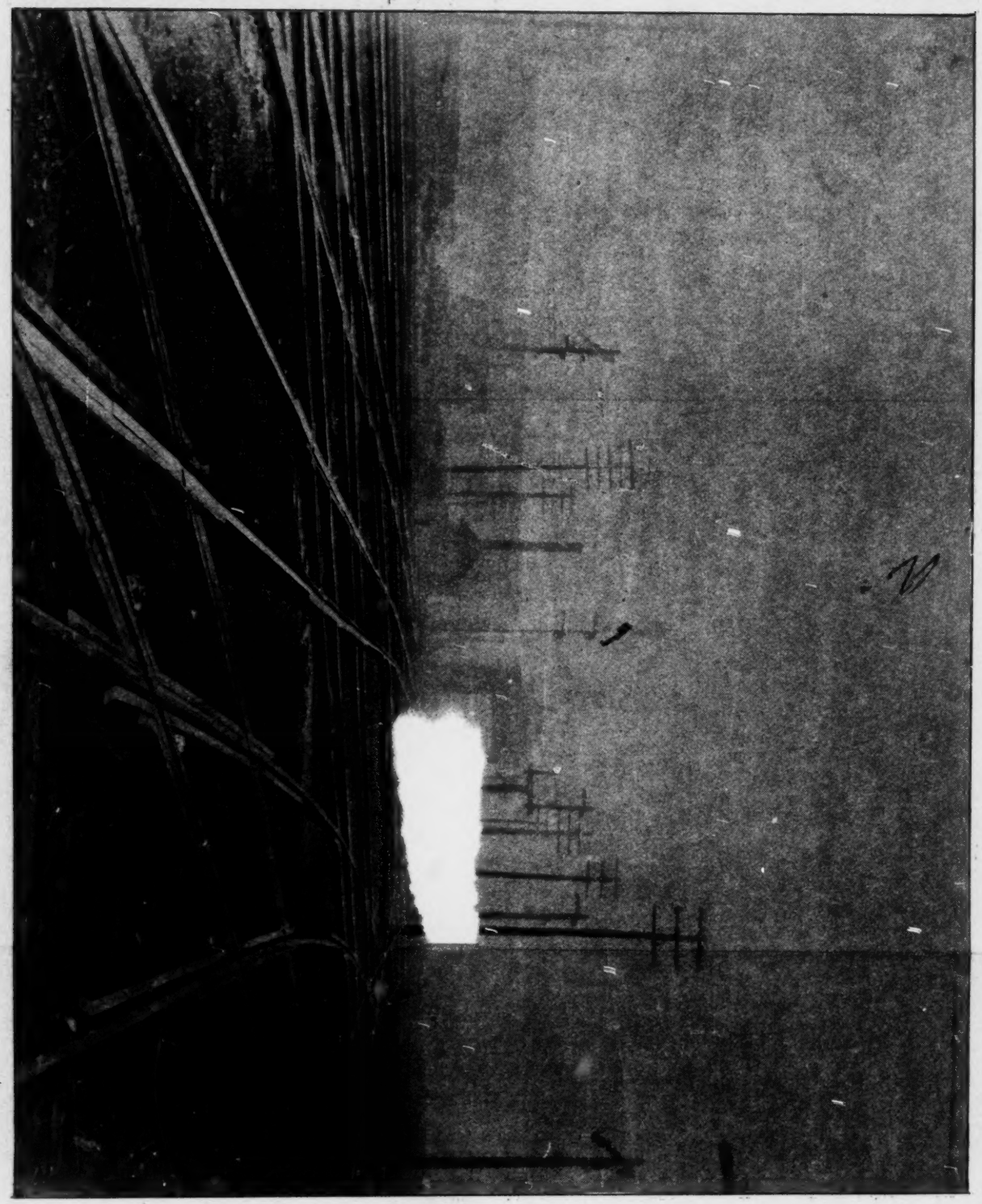
Mr. EVERETT: I offer the whole document, so that the jury may have the whole thing.

The COURT: Well, the motion will be denied then.

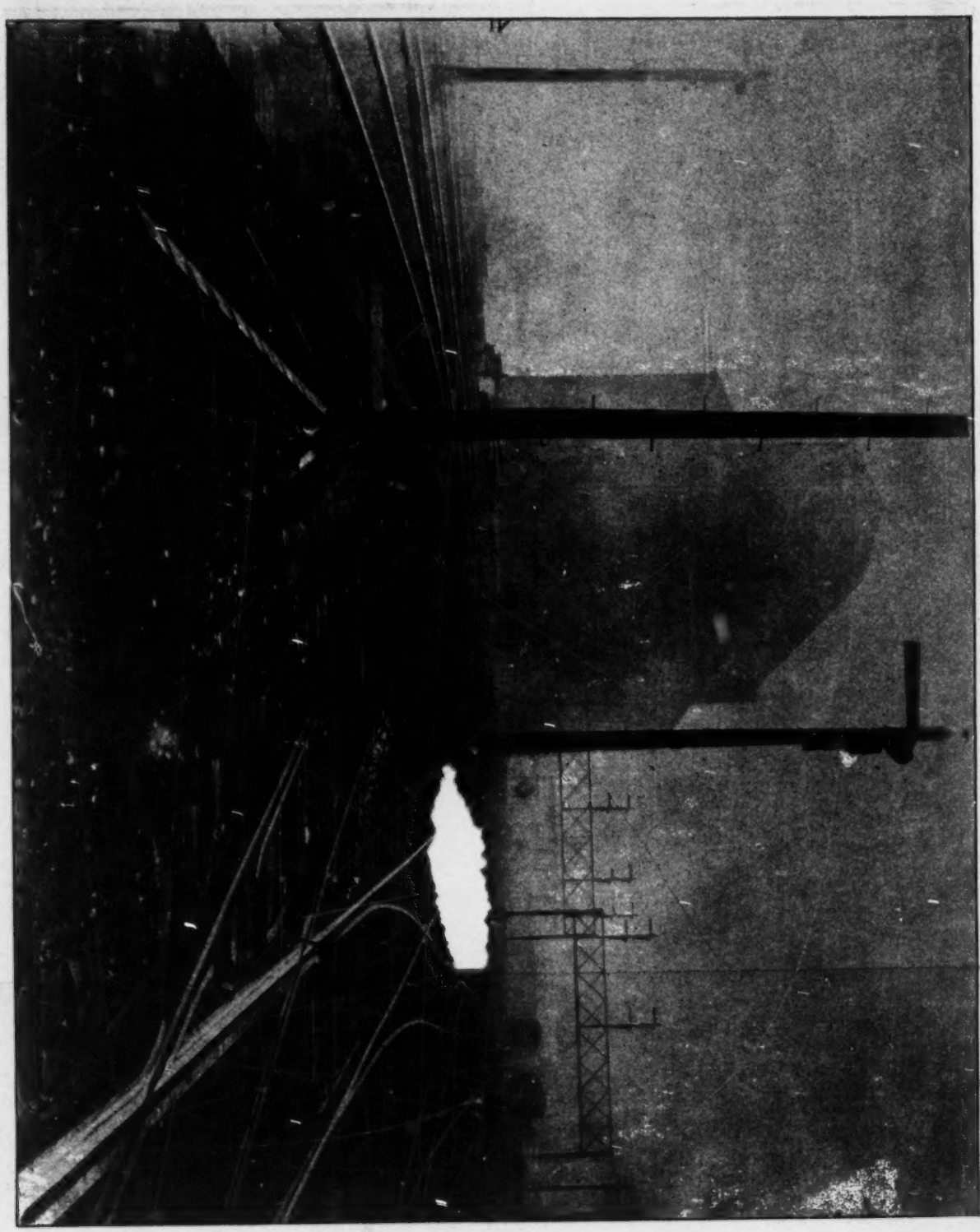
Mr. EVERETT: That is the motion to exclude it.

The COURT: Yes, the former ruling will be upheld.

Defendant's Exhibit (



Defendants Exhibit B.



Defendants Exhibit 'D'

519

Mr. McSHANE: Exception.

To which ruling of the court, the plaintiff then and there duly excepted.

Mr. EVERETT: I also at this time, desire to take an exception to the remarks of counsel that I offered it merely because it helped me.

To which remarks of counsel for the plaintiff, the defendant, by its counsel then, and there duly excepted.

Mr. McSHANE: You said so yourself—go ahead.

516 Mr. EVERETT: Defendant also offers in evidence the photographs already marked respectively:

"Defendant's Exhibit B for identification."

"Defendant's Exhibit C for identification."

"Defendant's Exhibit D for identification."

And ask that the same be marked Defendant's Exhibits "B" "C" and "D" respectively.

The court admitted said photographs in evidence, and said exhibits were marked as requested.

(Here follow photographs marked pages 517, 518, and 519.)

520 JOHN B. JACK, called as a witness on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Everett, and testified as follows:

Q. What is your name?
A. John B. Jack.
Q. What is your profession?
A. I am a physician and surgeon.
Q. Talk loud so that the last juror can hear you, docter.
The COURT: How do you spell your name?
The WITNESS: J-a-c-k, John B.

Mr. EVERETT:

Q. How long have you been practicing your profession.
A. Since 1895.
Q. Where did you graduate?
A. Rush Medical College, Chicago.
Q. Since that time—did you have any education prior to that time, in a Medical way?
A. In a medical way, I had studied one year with my preceptor before entering Rush Medical College in the fall of 1892.
Q. Have you had any hospital or college experience
A. Before I studied medicine; I was attending the Nebraska State Normal School.
Q. Give us all of your hospital and medical experience, that you had.
A. After graduating from Rush Medical College in 1895, I practiced medicine in Nebraska for three and a half years, entering then the service of the Burlington as medical examiner of their Relief Department. I have been in that service since.
Q. Have you been associated or connected with any hospital?
A. No, sir.
Q. Do you know the plaintiff in this case, Joseph Wagner?
A. I do.
Q. How many times have you examined him?
A. I can't say how many times, I have seen Mr. Wagner at least once a month in the last two years, and probably on a
521 average of once in two or three months, I have examined him.
Q. When was your last examination?
A. The last examination was at my office on March 1st, of this year.
Q. Did you make a complete examination of him at that time?
A. I did.
Q. Just state to the jury what examination you made.
A. Mr. Wagner removed all of his clothing, and I examined him completely, tested all of his organs and went over him thoroughly.
Q. Keep your voice up, doctor, please, Did you test the reflexes?
A. I did.
Q. Anything further, any further tests that you made?
A. I examined his chest, his heart and his lungs, his abdominal organs, his reflexes, his eye reflexes; I examined with reference to

his tactile sense, thermic sense, and I made certain measurements of his body.

Q. What was your finding of these conditions that you have examined.

Mr. McSHANE: I object, let him tell what he saw.

The COURT: Yes, that is a conclusion, Let him tell what he saw there.

A. I found Mr. Wagner in an normal condition, except that he had a rather long, depressed scar on his lower abdominal wall; his right thigh and leg was slightly smaller than the left, and so far as I think, at this moment, I found nothing wrong. There was, of course, the alleged symptoms from——

Mr. EVERETT:

Q. Were the reflexes normal?

A. The reflexes were normal at that time.

522 Q. What would that indicate to you, doctor, or what did it indicate?

A. Well, it indicated a normal condition of the spinal nervous system, of the nerves of the spine.

Q. Did you find any interference with his power of sensation?

A. No, I did not. In testing him with a test tube, one containing hot water, and the other cold, also in tactile sensation, the sensation seemed to be a little delayed but that was a matter that was difficult to judge, because I could only tell the promptness of sensation by his admission to it.

Q. But there was——

A. But there was a delay in the admission of sensation, and I thought possibly the interpretation of the sense might be a little delayed, but of that I was not certain.

Q. Was there a loss of sensation?

A. There did not seem to be any loss of sensation in any area, although he alleged that there was, but upon examination, I could not find it.

Q. Doctor, you have seen him you say at various intervals, for the past two years since his accident?

A. Yes, sir—well, not ever since the accident, his accident was in December what?

Q. Shortly after the accident?

A. I saw him first on the following February. Since then I have seen him on an average of once a month, except during a period of three or four months that he was in California. That was in the fall and winter of 1909, I believe.

Q. At the last examination you made, did he make a statement to you that his eyes had receded about a quarter of an inch?

523 A. Well, he made a statement that his eyes had receded in his head, I do not remember as to the quarter of an inch part of it.

Q. Have you an opinion as to whether or not his eyes at that time had receded, between the time you first saw him, and the time you made this last examination?

A. Yes, sir, I have an opinion.

Q. What is that opinion?

A. My opinion is that they had not receded.

Q. You looked at them and made an examination for the purpose of determining, did you not?

A. Yes, I could see no difference in his appearance on March 1st of this year to what it was at any previous times.

Q. Did he make a statement to you about any loss of sexual power or manhood?

A. He did.

Q. What did he say—when was this statement made was this at this last examination?

A. His first statement along that line was a number of months ago, as near as I can fix it in September 1910, I think was his first statement to me—no, I remember he made complaint of that before he left the hospital, or about the time he was leaving the hospital; that would be September, 1909, a year previous. He stated that he was losing or had lost his sexual power. Then in March of this year, he made this statement, that he has lost his sexual appetite, that he has no desire for sexual intercourse, but that he had some power he indicated by the statement that he noticed that about once a week he has nightly seminal emissions.

Q. Now, what does that indicate to you?

A. Well, the fact of having seminal emission at night, of course, indicated that his testicles were properly performing their
524 functions, that indicates integrity of the seminal passages and of the ability of the seminal vesicles to empty themselves. His only statement at that time was a statement of loss of sensation. He claimed that this was accompanied not by pleasant dreams or any pleasurable sensation; that he only knew that his loss had occurred by reason of the condition of his night clothes.

Q. If he had lost his sexual power and the organs had become impa-red, would it be possible for him to have had these emissions at night that you have stated?

A. I don't think that it would, no, sir.

Q. Have you an opinion from the examination you made of him and from what he told you now, whether or not he has lost or impa-red his sexual power?

A. I have.

Q. What is that opinion?

A. You ask whether he had lost or impa-red sexual power?

Q. Yes.

A. Well, I really thought that perhaps as a result of the suffering that he underwent at the hospital, shortly after his operation, and perhaps, too, later on, and as a result of worry from anxiety as to the outcome of his injury and possibly later on from worry as to the outcome of the litigation, that his sexual appetite might be reduced to the point where perhaps he might himself think it was absent, But I personally, from the appearance of his sexual organs, and from what seems to me to be — integrity, I don't believe he has lost his sexual powers.

Q. Doctor, did you make an examination of him, as to his nervous condition?

525 A. I did.

Q. Have you an opinion, as to whether his nervous system is permanentely impa-red?

A. I have.

Q. What is that opinion?

A. I do not believe there is any permanent impa-rment of his nervous system.

Q. Have you an opinion, as to whether or not the pending of this lawsuit, and this other lawsuit, in reference to the same injury, has any bearing on his mental condition, and his nervous condition?

A. I have.

Q. What is that opinion?

A. I believe that these conditions aggrevate it.

Q. What is that?

A. That his pending suit causes him worry, and aggrevates his nervous symptons.

Q. When the cases are disposed of, do you believe they will have any effect upon his regaining his normal nervous condition?

A. I do, yes, sir.

Q. What is that opinion?

A. I believe that Mr. Wagner will improve when these cases are disposed of.

Mr. McSHANE: What is that?

Mr. EVERETT: He believes he will improve.

A. I believe that Mr. Wagner will improve when these cases are dispised of.

Mr. EVERETT:

Q. From the time that you first saw him until you made this last examination in March of this year, you said, didn't you?

526 A. March of this year, yes, sir.

Q. (continued). Did you note an improvement in his condition?

A. From the time that I first saw him up to March first of this year, yes, a decided improvement in every way.

Q. Decided improvement?

A. In every way, except in regard to certain alleged nervous symptons.

Mr. McSHANE: Louder, doctor.

A. I beg pardon.

Mr. EVERETT: A little louder. What did he say?

(Answer read.)

Mr. EVERETT:

Q. Those nervous symptons were the ones that he stated himself, were they?

A. Yes, sir.

Q. As to his condition?

A. Yes, sir.

Q. Not what you could find?

A. No, sir.

Q. Did you find anything that bore out the statements that he made, concerning his nervous condition, objectively?

A. No I did not.

Q. You depended entirely upon his statement?

A. Yes, sir.

Q. Doctor, have you had experience in cases of this kind?

A. Not a great deal of experience. These kind- of cases are rather rare in my experience, although I have been with the railroad company, in their service, six years, and have seen a great many injuries, injuries of this particular kind——

Q. You will have to speak a little bit louder; we have difficulty in hearing you.

A. (Continuing:) —with these alleged feelings afterwards, have been rather rare in my experience.

527 Q. Have you had experience in injury cases?

A. Yes, sir.

Q. How extensive has that been?

A. Well, it has been rather extensive.

Q. Well, how many a month, a general average during the last six years?

A. Well, I presume that I treated in my office, now perhaps from three to eight new injuries a day, and then redressed, of course, previous injuries.

Q. Three to eight new injuries a day?

A. Yes, of course, those injuries, as they come and go in ordinary railroad service.

Q. Have you an opinion as to whether or not the plaintiff in this case at this time is able to work and earn money?

A. Yes, I have.

Q. What is that opinion?

A. My opinion is that Mr. Wagner, my opinion is that if Mr. Wagner would go out—I hardly doubt, but——

Q. Talk a little louder, please.

A. (Continuing:) —if he would resume work at some light employment that would occupy his mind, and give him some reasonable muscle exercise, that it would only be a matter of time until he would again gain confidence in himself, until his muscle system would respond, and he would grow stronger, and then it would only be a matter of a short time until he would be able to do ordinary labor.

Q. You spoke of atrophy of the right leg, didn't you?

A. Yes, sir, there is.

528 Q. Wouldn't favoring that leg produce atrophy such as you find there, would it not?

A. Yes, yes, I think it would, perhaps. The atrophy was slight in fact, if I remember correctly was over the calf of the leg, which is the largest part of the leg, and the one which usually shows shrinkage more markedly, there was a difference of less than an inch, I think three-quarters of an inch in the measurement of the

two legs. Of course, elsewhere the difference would be less than in that. That would be the most marked point. That would be the most marked point, probably.

Q. With the use of the leg, exercise and fresh air that would be overcome, wouldn't it?

A. I think in time it would, it would tend to at least. Of course, this must be kept in mind that some people naturally have a little difference in the size of their legs. Most right handed men, for instance, have the right arm a little larger than the left. It frequently happens that one leg, that the right leg is a trifle larger also.

Q. So it is not unusual, not what would be called abnormal for one to have those differences, is there?

A. Well, I would not——

Q. I don't mean by "normal" an absolutely perfect person.

A. It some times happens that it is so.

Q. Did Mr. Wagner say anything to you as a reason why he stayed at the Alexian Brothers Hospital?

A. Well, not after going to the hospital, he did not.

529 Q. Did he before?

A. Yes. About three months ago, or such a matter, Mr. Wagner remarked to me one day that he was looking for some institution that would take him in, thinking that he could lodge as reasonably there as paying room rent and board outside.

Mr. McSHANE: Keep your voice up.

A. (Continuing:) —and incidentally be more comfortable, perhaps, more comfortably cared for.

Mr. EVERETT:

Q. That is, he could live in a hospital as cheap as——

Mr. McSHANE: I object to that, telling him.

Mr. McSHANE: Let him tell what was said.

Mr. EVERETT:

Q. Did you weigh the plaintiff?

A. I did once, only.

Q. When was that?

A. March first of this year.

Q. What was his weight at that time?

A. Stripped, his weight was 157¼, with his ordinary street clothes on, 169¾.

Q. How much with his clothes on?

A. 169¾.

Q. He is a man 5 feet 5 inches, about?

A. Yes.

Q. Do you know whether that is the normal weight for a man of his height?

A. Well, that would come within the limits of normal weight. Of course, we sometimes consider a certain weight; below that as abnormally thin, and above a certain other weight would be considered abnormally heavy. He would come within the average weight for a man of that height.

530 Q. Isn't it a fact that he is somewhat heavier for his height than the weights given by the schedules of the life insurance companies?

A. Well, I don't know positively, because I have not in mind what those schedules are, but as a guess I would say no, I should say that he is not above the maximum weight of a man of that height. That is merely a guess, I don't know.

Q. As you look at him now, what is his appearance, so far as his outward appearance is concerned, as to whether he looks to be in a good healthy condition or not?

A. The man's appearance to me at this time is a man of good vigorous general health.

Mr. EVERETT: That is all. Take the witness.

Cross-examination by Mr. McSHANE:

Q. Do you think doctor that when the law suit is over it may improve his nervous condition?

A. I think so.

Q. That is upon the theory that any source of worry of fret or annoyance is injurious to one suffering with nervous affliction, That is right isn't it?

A. Yes, sir, or one in normal health, worry of any kind, whether one is suffering from nervous affliction or in good health.

Q. However honest one may be, you think that when the trouble is over and the fret and the worry that it ought to help him some.

A. I should think so, yes sir.

Q. You are not a nerve specialist, are you doctor?

A. Yes, sir.

Q. You don't pretend to be a specialist?

531 A. I don't pretend to be, no, sir.

Q. Now on the question of weight, you know, do you not, doctor that the question of weight is of little or no significance on the proposition of whether or not one is suffering from nervous trouble, in other words, one may suffer and be thin or stout or any degree of flesh?

A. Yes, except——

Q. You have answered the question. In other words the weight hasn't anything to do with it?

A. But little to do with it.

Q. Yes, isn't it true that those suffering from neurastheia doctor, or neurasthenia, it — used both ways?

A. Yes.

Q. Isn't it true that those suffering from that is aggrevated from often look almost the picture of health?

A. No in all patients that I have seen suffering from Neurasthenia is aggrevated form have been bed ridden and have been sick patients.

Q. Well you are not an expert on neurasthenia, are you doctor?

A. Well I have seen——

Q. Or on nervous diseases?

A. I have seen a great many neurasthenia, but I don't pretend to be a nerve expert.

Q. What is that?

A. Well I have seen a great many cases and have considerable expireence, but I do not pretend to be a nerve expert.

Q. You have seen people suffering from that affliction who walked about and all, would have not been able to do a thing?

A. Yes, but one suffering from——

Q. Well, which——

Mr. EVERETT: I object to that, Counsel should let him finish his answer.

Mr. MCSHANE: I did not want that.

Mr. EVERETT: I object to that when the witness is answering he is inter-uppted.

532 Mr. MCSHANE: I do not care for "but" you have it.

Mr. EVERETT: I will have "but" if the Court will allow him.

The COURT: If he wants to modify his answer he may.

Mr. MCSHANE: If he wants to qualify his answer he may.

A. Persons walking around with neurasthenia are so apparently sick that I think any one would recognize them as invalids, as a rule, there are very few exceptions, I think though.

Q. What is that?

A. There are very few exceptions I think to that general proposition.

Q. You never made, you say you never made a specialty of the treatment of nervous diseases of any kind?

A. No, sir not a specialty of it, no, sir.

Q. There are cases of neurasthenia, there are no organic changes are there?

A. Not in a straight case of neurasthenia.

Q. In other words there are no conditions that can be determined upon as to whether a person is suffering or are suffering, is there or are there?

A. Not as you search the organs one by one, but——

Q. Just answer the question doctor.

A. I will try to, thank you.

Q. In other words there are no pathological changes in the disease known as neurasthenia?

A. Not demonstratable.

Q. Now ever when the person is dead dissected they can — pathological changes in any of the organs or nerves, can they?

A. Well, I would not want to say that directly.

533 Q. Even in the most severe of hysteria, that is the one of the accepted propositions in your professions that there are no objective symptoms, isn't that true?

A. There are secondary changes.

Q. Let me ask you this. Will you answer the question? There are no objective or organic changes in the human body?

A. No.

Q. (continued.) There are no objective or organic changes in the human body that can be detected by the naked eye?

A. That is true.

Q. In other words in a case of Neuresthenia, whether the patient is or is not suffering is of necessity a matter largely subjective isn't it?

A. No, in any pronounced type it is apparent that the man has suffered, but it is difficult to find any particular pathological lesion.

Q. You cannot tell pathological-y whether Wagner suffered from Neuresthenia in some form or not, can you?

A. Not objectively, no, sir.

Q. No?

A. We can only judge it from his——

Q. If his complaints to you, if any of them are correct he has it, hasn't he?

A. No, I don't think he has neurasthenia.

Q. If he—if he complains of these various pains—and he made them to you didn't he?

A. Yes, sir.

Q. You do not know that they are not true?

A. No, sir.

Q. If they are true he is suffering from a nervous disease?

A. Yes, but I could call it hypochondria, rather than neurasthenia.

Q. Well what ever you call it *whatever you call it* he was suffering from a nervous disease——

A. Yes sir.

Q. (Continuing:) —If those complaints are true——

A. Yes sir.

Q. —do you not know that they are not true?

A. No, sir.

534 Q. Speaking of the man's eyes receding in his head, the eye does never recede, in the strict sense, but it seems to recede to the patient, isn't that true?

A. I have no doubt to him—it may seem to him that it has receded, there is no ocular evidence of it to me.

Q. Have you heard of people—there are in all cases—You have people say "My eyes are way back in my head"?

A. Yes, sir.

Q. Now there eyes are not back in their head but they seem so isn't that so?

A. They seem so, yes, sir.

Q. He is not any different in that connection from somebody else in that connection?

A. No, sir.

Q. You don't know that his eyes do not seem to be away back in his head?

A. No I do not.

Q. Do you know whether there was a fracture of the pelvis?

A. I know he had a fracture of the pelvis from hearsay only.

Q. You know it is a faulty position, don't you?

A. I believe so.
Q. Or do you know?
A. I don't know, but I believe so.
Q. Well, in enumerating his conditions, you forgot to say that his pelvis was out of condition?
A. Yes, sir.

Mr. EVERETT: I object to that; the doctor said he only heard, he did not know of his own knowledge.
The COURT: Overruled.
Mr. EVERETT: Exception.
To which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

Mr. MCSHANE:

Q. You do not know that his pelvis was not fractured, do you?
A. Well, I know from the report that the surgeons made to me when I come here that he had a fractured pelvis, yes.

Mr. EVERETT: I move that answer be stricken out.
The COURT: Strike it out, yes.
535 Mr. MCSHANE: I just want to clear it up, doctor.

Q. You do not pretend to tell those gentlemen that he had no fracture of the pelvis?
A. No, I think he had.
Q. Yes, of course, you do not mean to tell them that he is not lame in one leg, do you?
A. I do not believe he is lame.
Q. You have seen him walk, haven't you?
A. Yes.
Q. Is there anything in your experience or teaching that enables you, better than a layman, doctor, to tell whether a man walks lame or not?
A. I could find no——
Q. No, no.

The COURT: Louder, doctor.
Mr. EVERETT: Will you throw your voice away out?

Mr. MCSHANE:

Q. When you see a man walk across there (indicating court room), you can tell the same as these gentlemen whether he walks lame or not, can't you?
A. Yes, sir.
Q. In other words, there is nothing in medical science or education that enables you to determine better than anybody else—that enables you better than anybody else to tell whether a man walks some lame?
A. Yes, sir, I know that he walks somewhat lame.
Q. What is that?
A. Yes, I know that he walks somewhat lame, yes, sir.
Q. Yes. You have always seen him with a cane, haven't you?

A. Yes.
536 Q. Leaning on a cane?
A. Yes.
Q. Don't he rather jerk one leg after the other?
A. Yes.
Q. Or do you recollect?
A. That has been about his walk yes.
Q. Whether that was necessary or not, you don't know?
A. No, sir.
Q. You are still carrying him on the relief department, are you?
A. Yes.
Q. You don't carry people who are able to work?
A. No, sir.
Q. Whatever may be the speculative feature as to whether he will in the future be able to work or not, you do not think he is able to work now, do you?
A. Well, we are giving him the benefit of the doubt along that line. We would not ask the man to go to work now, we have never asked him to go to work.
Q. You do not think he is able to work now, do you?
A. Well, I think he is able to commence working at something.
Q. Would you——

Mr. EVERETT: Let him finish his answer.
The COURT: I can scarcely hear you.

The WITNESS: It is rather difficult for me to say.
Mr. MCSHANE: Doctor, in the position there, really, you represent the men in a sense?
A. Yes, sir.
Q. And the Company in a sense?
A. Yes, sir.
Q. It is not fair to the men who pay this money in for their own support, to carry people who are able to work, is it?

Mr. EVERETT: I object to that question.
The COURT: Objection sustained.

Mr. MCSHANE: Well, do you know whether they would carry a man as disabled whom you thought was able to work?
A. No, sir, not as a general proposition.
537 Q. You don't think—in carrying this man, you do not think he is able to work, do you?

Mr. EVERETT: I object; he has answered twice.
The COURT: He may answer again.

Mr. MCSHANE:

Q. You do not now think he is able to work, do you?
A. No, except as qualified by answering the question asked by the other counsel.
Q. You think if he could get at some lighter situation, getting his mind off of his condition, and he did improve, that he might later be able to work?

A. Yes, I think he would improve and would be later able to work.

Q. But *it* he did improve, *eten* your guesses are all wrong, aren't they?

A. Yes, but I think that he would, that is my judgment.

Q. Did you notice, doctor, in talking to this man, any slowness of speech in collecting his thoughts?

A. I can't say that I have.

Q. Don't you know that that is one of the things of all the rest that nerve experts watch?

A. Yes.

Q. As to whether or not?

A. Yes, sir.

Q. Haven't you noticed that when you ask him the simplest question, often he sits for the fraction of a second or maybe a second of two before he has answered the simplest question, have you not observed that?

A. No, sir, I have not.

Q. Never paid any attention to it?

A. No, I have not observed it. Mr. Wagner has—not a peculiar personality, but he has ways of his own, he has ways that are his own. But I would not interpret them as being such as you describe in your question.

538 Q. Well, do you say that this man has not in his speech an abnormal condition in that he is frequently asked the simplest question, and he waits an undue, an unusual length of time before he answers?

A. I have not observed that in my conversation with him.

Q. You do not think that is not so, do you?

A. It has not been so in my observations with him.

Q. Speaking of hy-ocho-driac, you mean one who sorts of thinks he is worse that he is, is that right?

A. That is a fair description of it.

Q. And the condition- so far as you may figure them to be speculative, as being mental, they are real to the person, aren't they?

A. Yes, sir. Sure.

Q. And the disability is as real to the person as though there was some organic change, isn't it?

A. Yes.

Q. You know, do you not, doctor, that in cases of hysteria, that run a life time, about half of your profession thinks it is simply a matter of mind, don't they?

Mr. EVERETT: I object to that.

Mr. MCSHANE: Well, do you know what your profession teaches on that score?

Mr. EVERETT: I object to that; he does not know what the profession teaches.

The COURT: What is the question?

Mr. MCSHANE: I will ask another.

Q. Hysteria is simply an aggravated nervous condition, isn't it?

A. Yes, sir.

Q. Well, is it or is it not the teaching of your profession that about—aren't there two schools there, one of which that believes it is entirely a matter of mind, and others that it is not a matter of mind, that it is not wholly a matter of mind?

Mr. EVERETT: I object to that.

539 Mr. MCSHANE:

Q. (Continuing:) —but that is one form of nervous diseases?

Mr. EVERETT: I object to that. Ask him what the two different schools believe on a certain subject.

The COURT: Read the question.

(Question read.)

The COURT: He may answer.

Mr. EVERETT: Exception.

To which ruling of the Court, the defendant, by its counsel, then and there duly excepted.

The WITNESS:

A. These cases?

Mr. MCSHANE:

Q. Do you know?

A. Yes, I know.

Q. Do you know whether I said it right or not?

A. I do not believe I just understand you.

Q. That is to say the highest authorities on your profession differ as to whether or not nervous troubles, even the most aggravated type, when they are of the form called hysteria, whether they are purely a matter of mind, or whether there are not also some organic conditions there that is not discoverable?

A. I think there is not a great deal of difference.

Q. Doctor, I am not asking you your opinion, I am asking you if the profession don't teach so and so. I do not care for your opinion, you say you are not an expert on it. The French School, as distinguished from the English school, don't the French school go on the theory that it is solely a condition of the mind, and the English school act on the theory that it is not wholly a condition of the mind?

A. I don't know which either one teaches.

Q. In other words you have not followed that particularly?

540 A. No, not particularly, although I have an opinion on that, in regard to that.

Q. What is that?

A. No, not particularly, although I have an opinion in a matter of that kind.

Q. Doctor, in cases of neurasthenia, the reflexes may all be normal in the most aggravated cases, may ther not?

A. They may be, but they are not apt to be, there is apt to be——

Q. The reflexes in neurasthenia may be aggravated, may be exaggerated, or they may be diminished?
A. Yes, sir.
Q. There is no rule about it, is there?
A. No, sir.
Q. In other words, one patient suffering from neurasthenia may have very exaggerated reflexes, and in another they may be subnormal or almost absent, isn't that true?
A. I think as a general rule the reflexes are exaggerated in neurasthenia.
Q. You know that there is a wide range?
A. I know that there is a wide range, yes, sir, varying rule.
Q. So when you speak of testing this man's reflexes, you know that it does not throw any material light on whether he is suffering from nervous trouble or not, do you?
A. Negative only.
Q. Now, doctor, about nocturnal emmissions, is that evidence of undue weakness, whether it be only functional or otherwise, when there are nocturnal emmissions?
A. No, it is rather evidence of chastity, rather evidence of chasitty, evidence that the man is not otherwise getting rid of his seminal fluid.
Q. What you mean to say is that so far as you could see there are no changes, organic changes in this man's sexual organs?
A. Yes, sir, I mean exactly that.
541 Q. You know, doctor, that there may be total loss of power without any organic change, functional power?
A. Yes, I do, but in those cases there is a change in the appearance of the sexual organs that could hardly escape notice.
Q. Now, that is in the nervous branch, isn't it, of the profession? That question that you are now talking about, as to whether there may be functional temporary or permanent loss of sexual powers, that is a matter within the domain of the nerve specialist, isn't it?
A. Well, I suppose it is, yes, sir.
Q. You never have made a specialty of that?
A. No, sir.
Q. If the man told you the truth about his sexual organs, why, he, at least, feels that his passion or his desire is gone?
A. Yes, sir.
Q. You do not know that he does not tell the truth, do you?
A. No, sir.
Q. Is Dr. Ryan, is he the man in your department?
A. Dr. Ryan, a few months ago was made surgeon for our road, yes, sir.
Q. And Dr. Ehrmann?
A. Dr. Ehrmann.
Q. What is his connection?
A. Dr. Ehrmann is at this time surgeon for our road, too.
Q. Well, at the time that this man was injured, which one of them was in charge at the hospital, at the time Mr. Wagner was injured?
A. At the time Mr. Wagner was injured, I was stationed at

Omaha, Nebraska and for that reason, I have no personal knowledge about that.

Q. You don't know?

A. So that when I came here I learned the things that could answer your question perhaps.

Q. When did any of those gentlemen first question you about this accident?

542 A. Yesterday.

Q. Yesterday?

A. Well, that is the attorney, I suppose you mean?

Q. Well, any one in reference to this—well, I suppose your down department you have talked to?

A. Yes.

A. As to the other side, you say yesterday was the first time?

A. Some one, I think the other side's representative, called at my office, but I do not know what his connection was, whether he was a claim agent or investigator.

Q. When you speak of their being a marked improvement, the last time you saw him, you mean improvement over the first time you saw him?

A. Yes, sir, that is strictly in regard to purely physical conditions present. The first time I saw him he had a discharg- of urine through his abdominal wall; that had been entirely healed, his pelvis fracture healed.

Q. That was in the hospital?

A. That was in the hospital, yes, sir.

Mr. McSHANE: That is all, thank you.

Redirect examination.

By Mr. EVERETT:

Mr. EVERETT: Just a minute, I have one or two questions.

Q. You have stated you are not a nerve specialist. In your stidy of medicine and in your practice of it, are you acquainted with the nervous system of the human body?

A. Yes, sir, during my course in school, I was compalled to take the same course in the diseases of the nervous system, the anatomy of the nervous system and the physiology of the nervous system that any other and every other medical student took. Since I have graduated, I have come across frequently nervous diseases, and observe them as any other physician who is not a nerve specialist would observe them.

543 Q. Have you prescribed for them, treated them?

A. I have frequently.

Q. You have had experience along that line?

A. Yes, sir, about as much as any ordinary practitioner of medicine and surgery would have.

Q. What you meant was that you do not confine yourself exclusively to nerve cases?

A. That is the idea. I am not a nerve specialist, in that I do that work to the exclusion of anything else.

Q. Now, you are asked a question whether or not you know the state-ents made by the plaintiff to you were true. Have you an opinion as to whether or not the statements that he made in reference to his nervous condition are true?

A. I have.

Q. What is that opinion?

Mr. McSHANE: Which statements now, please?

Mr. EVERETT: Well, in reference to his pain and his neurasthenic conditions?

Mr. McSHANE: Well, in reference to pain, one thing at a time.

Mr. EVERETT: Neurasthenic condition.

Mr. McSHANE: Don't cover the whole thing at once.

Mr. EVERETT: Well, in reference to neurasthenic conditions we will take that whole thing.

Mr. McSHANE: He asked, what statement did he make that he thinks was not true. I object, unless he has some reason, and give something as a reason.

Mr. EVERETT: That is what I am going to follow it up with. If his observations and tests led him to believe it was not true.

The COURT: Proceed.

544 Mr. McSHANE: If there was any specific statement.

The WITNESS: I believe that the main symptons that Mr. Wagner has complained of to me, *he* believed to be true.

Mr. McSHANE: He believed to be true?

A. Yes, but I believe, too, that practically all his alleged or the majority of his feelings, his feelings of pelvic pain, of anesthesia about the hips, of coldness and numbness below the knees, of inability, for instance, to sleep on his right side—he says he can sleep on his back, but cannot sleep—I think it is the right side—one side or the other—when he sleeps on his right side, he is awakened by cramps in his legs—*O* believe those symptoms are largely exaggerated, either consciously or unconsciously.

Mr. EVERETT:

Q. Now, why do you believe that, did those tests that you made of his nervous condition——

Mr. McSHANE: He is your own witness, let him tell.

Mr. EVERETT: I will ask the question if you will permit me.

Mr. McSHANE: Don't lead him, please.

Mr. EVERETT:

Q. Did the test that you made influence you in arriving at that opinion, if so, how?

A. I found no pathological reason why he should suffer any of the symptoms that he alleged, and I was forced, therefore, it seemed to me to conclude one of two things: Either that he did not actually suffer those, or if he did—or that he merely thought that he did. And I think that in regard to the pains that he has completed of that, therefore, he may be guilty, perhaps, of consciously overstating them, perhaps for a purpose. In the fall of 1909, he wanted to

go to a warmer climate, and did go, and his alleged reasoj was that when the weather changes in this climate, he suffered excruciating pain. We all know that after certain fractures a man has a certain——

Mr. McSHANE: I object, wait a minute.

545 The COURT: Yes.

Mr. McSHANE: A specific statement is what you asked him for.

Mr. EVERETT: I think I asked generally on what he bases his opinion and his answer.

The COURT: Yes but he is talking about the plaintiff, making a statement to him and then he goes on to talk about other fractures.

Mr. EVERETT: He saya that the plaintiff made a statement to him about going away.

The COURT: Yes but he was giving his reason about certain pains, I suppose that it what counsel objects to.

Mr. McSHANE: Yes.

The COURT: The lat-er part of the answer.

Mr. EVERETT: Just that one poriton.

The COURT: Yes strike that out.

Mr. EVERETT:

Q. Doctor, continue along and give the symptoms or conditions upon which you base your opinion that he was not telling the truth, either that he was not telling the truth or that he *was* merely believed he had these pains.

A. Well, in short the absence of definite pathological reason why he should have any of these symptoms lead me to doubt the real existance of those sypmtoms.

Q. If he actually—If the conditions that he complained of actually existed, are there any tests that would disclose it?

A. There are tests that would disclose the area anesthesia that he complained of.

546 Q. Did you make those tests?

A. I did. I could not find any area of anesthesia; I did find that his tactile sense seemed to be delayed.

Q. Yes.

A. That he was slow in responding, but there was no anesst-esia.

Mr. McSHANE: Will you read that last question and answer?

The COURT: What is that?

Mr. McSHANE: I want to have the question and answer read.

The COURT: Yes, read the question and answer read.

(Question and answer read.)

The COURT: Is that all, Mr. Everett?

Mr. EVERETT: No, your Honor.

The COURT: Proceed.

Mr. EVERETT: Well, your last answer, that is what you told us on your direct examination.

A. Yes, but I do not know of any test that could be applied to many of his other alleged sypmtons.

Q. Doctor, isn't it a fact that one who has one leg shorter that the other, that the pelvis will tip to accom-odate the discrepancy between the two legs?

A. Yes, sir that is true.

Q. That is true, that the pelvis will tip to occom-odate a discrepancy between the two legs, if one leg is shorter than the other?

A. Yes, that is true.

Q. You say you did not observe any lack of power of concebtration and thought and power of collecting his thoughts, and hesitating in speaking on the examination you made, you say you did not observe any?

547 A. I did not observe any. On the other hand in dealing with Mr. Wagner he has proved himself to be very shrewd on several occasions.

Q. He has proved himself to be a very shrewd on several occasions?

A. Yes sir.

Q. Assuming that he stood a cross examination of two or three hours and a direct examination of several hours, and answered the questions very frankly and quickly without any hesitation except on one occasion, and on that occasion he was asked whether or not he could have stood on the footboard instead of on the side of the car, and that is the only time he made a hestitation, and then he hestitated for quite a while: Have you an opinion as to whether or not his mind or brain has been affected?

Mr. McSHANE: I object to that.

The COURT: The objection will be sustained, that is a mattet of common knowledge.

Mr. EVERETT: Exception to the ruling.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Mr. EVERETT: ——.

Recross-examination.

By Mr. McSHANE:

Q. Doctor, in your studies, and perhaps in your experience you have seen people in hysteria who claimed to be unable to move their arms, haven't you?

548 A. I have seen cases where they claimed to be unable to use the ankle joint, but I have never seen hysterical elbow joint that I know of.

Q. You know that there are such?

A. I know that there are such, I have heard of them and I have seen hysterical ankle joints.

Q. Don't you know that there are cases where people go through life apparently unable to move their arm, whereas if they were put under an anesthetic a surgeon could move it freely?

A. I know that such people go a long time under tjose conditions.

Q. A lifetime, don't you know that, don't the books tell you of

people, without a law suit or anything else, go a lifetime with a rigid arm or ankle, and when they are put under an anesthetic the surgeon moves it freely, don't you know that?

A. I don't call to mind the lifetime part of it.

Q. Well, for years?

A. Well, for years, for years—for months at least.

Q. Now, in those cases there are no pathological changes observable and yet the conditions is there isen't it?

A. Yes, sir.

Q. So in case when you say you found no pathological conditions you could not—there are no pathological conditions that accompany true hysteria, are there?

Mr. EVERETT: I objedt as not——

Mr. MCSHANE: That is all.

Mr. EVERETT: I object to that as not cross examination.

Mr. MCSHANE: That is all.

Mr. EVERETT: That is all, doctor, I am very much obliged to you.

549 (Witness excused.)

Mr. EVERETT: Mr. Redfern.

JOSEPH REDFERN, called as a witness on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Everett and testified as follows:

Q. What is your name?

A. Joseph N. Redfern.

Q. What is your business, Mr. Redfern?

A. I am superintendent of the Relief depatrment of the Burlington road and the employment department of the Burlington road.

Q. That is the Chicago, Burlington and Quincy Railroad Company is it?

A. Yes, sir.

Q. How long have you occupied that position?

A. I have been superintendent of the Employment department since January 1st 1908 when that was established. I have been superintendent of the Relief Department since the first of July 1903.

Q. What are your duties, or what were your duties when you were superintendent of the Relief Department?

A. General supervision over the work of the department provided for by the rules and regulations of the department.

Q. Will you give us a general discription of the Relief Department that is connected with Chicago, Burlington and Quincy Railroad?

Mr. MCSHANE: Wait a minute, I object to that; I think the plan and scheme is all outlined in your books and application and that writing is the best evidence.

Mr. EVERETT: Well then I will offer this; is their any objection?

550 Mr. MCSHANE: Show him that.

Mr. EVERETT:

Q. I hand you this document and ask you what it is in a general way.

(Counsel hands document to witness.)

A. It is a copy of the regulations of the Relief Department of the Chicago, Burlington and Quincy Railroad Company in force today and it has been in force since the 15th day of June 1907.

Mr. EVERETT:

Q. What rules were in force prior to June 15 -07, were they the same or not, that is what I want to know?
A. There were the same for three or four years exactly.
Q. Prior to that?
A. Yes, sir.
Q. So on December 15th, 1908, the same rules and regulations were in force that are in this book were they?
A. Yes, sir.
Q. This book was prepared under your supervisions and direction wasn't it?
A. It was.

Mr. MCSHANE: I move to strick out his summary of the other rule, your Honor. They ought to speak for themselves. Let them produce them.
Mr. EVERETT: What other rule?
Mr. MCSHANE: The ones that he speaks of that were in force prior to that time.
Mr. EVERETT: He says that they are the same as these (indicating).
Mr. MCSHANE: I object if the Court please there is apparently some purpose for a change.

Mr. EVERETT:

Q. Was there any change made?

Mr. MCSHANE: Wait a minute please.
551 The COURT: The objection will be sustained and that portion of the answer will be stricken.
Mr. MCSHANE: Unless he shows that they are destroyed, or something. If there is any book in existance that is the best evidence.

Mr. EVERETT:

Q. Have you a book of Regulations of the Relief Department that were in force prior to June 15, 1907?
A. I have.
Q. Have you it with you?
A. I have.
Q. Will you let me have it?

(Witness hands document to Counsel.)

Q. Is this document or book that you have handed me a correct

copy of the — Relief Department of the Chicago, Burlington and Quincy Railroad that were in force December 15, 1908?

A. Not December 15th 1908.

Q. Were they in force up to—between March 1st 1904 and up to June 15, 1907?

A. They were.

Q. From June 15, 1907, this other book is a copy, a correct copy of the rules and regulations that were in force at that time, is that true?

A. From June 15th, 1907, up to today.

Q. Yes.

A. Yes.

Mr. EVERETT: I offer the two books in evidence, and ask that the first one be marked Defendant's Exhibit 10, and that he——

Mr. MCSHANE: The same general objection that the court is reserving.

The COURT: Yes.

Mr. EVERETT: And I ask that the book of Regulations dated June 15th, 1907, be marked Defendant's Exhibit 11.

The COURT: Objection overruled.

Mr. MCSHANE: Well, I thought the Court was going to reserve it all.

552 The COURT: Well, I presume that you had to make the record as you were going along.

Mr. MCSHANE: I only want to say, without stopping, for all this to all this Relief Department proof, I make the objection that I have heretofore stated, but I request the Court to postpone the ruling, as to whether it is right—in the meantime let it go on—and later when it is all in.

The COURT: Yes, I supposed you wanted to have a ruling in there

Mr. MCSHANE: No, No.

The COURT: The prior ruling was subject to be changed.

Mr. MCSHANE: It goes in, your Honor, it goes in, I am not standing in the way of that; he is intr-ducing it. Only I ask, I only want to note that it is in subject to the objection which we may speak of later.

The COURT: Yes. I made that statement at the start of the defense, that the rulings that were made were subject to advisement, or rejection later on.

Mr. MCSHANE: Well, that is all.

The COURT: I am just making a ruling now in order to keep the record straight, that is all, that is all. The question of the relief is subject to consideration later, I will take it under advisement.

Mr. EVERETT: Then these two books will be admitted now. Please mark them, Mr. Reporter, Defendant's Exhibit- 10 and 11. Mark the one dated March 1st, 1904, as Defendant's Exhibit 10 and the one dated June 15th, 1907, mark that Defendant's Exhibit 11.

(Which said books last above referred to being offered and admitted in evidence, were thereupon marked by the Reporter, Defendant's Exhibit- 10 and 11.)

553 "DEFENDANT'S EXHIBIT 10."

Defendant's Exhibit 10.

Def't- Ex. 10.

Regulations of the Relief Department of the Chicago, Burlington & Quincy Railway Co.

Operative March 1, 1904.

Announcement.

CHICAGO, ILL., February 15, 1904.

To all Members of the Relief Fund:

Amendments to Regulations, numbers 2, 3, 4, 9, 13, 14, 16, 21, 22, 23, 25, 28, 31, 32, 33, 36, 37, 43, 46, 47, 48, 50, 51, 54, 59, 61, 62 and 66, having been adopted by the Advisory Committee of the Relief Department, and approved by the Board of Directors of the Railway Company, I hereby announce, as required by Regulation No. 16, that said Amendments become operative March 1, 1904. This edition of the Regulations of the Relief Department embodies said Amendments.

J. N. REDFERN,
Supt. Relief Dep't.

Form 6001.

Revised Regulations of the Relief Department of the Chicago, Burlington & Quincy Railway Company.

Operative March 1, 1904.

Revised Regulations of the Relief Department of the Chicago, Burlington & Quincy Railway Co.

Operative March 1, 1904.

General.

1. The "Relief Department" is a department of the Company's service in the executive charge of a Superintendent, whose directions in carrying out its regulations are to be complied with, subject to the control of the President, except in such matters as are under the control of the Advisory Committee.

Wherever in these regulations the following words occur without qualification, they will have the meaning herein defined:

"Company" will mean the Chicago, Burlington & Quincy Railway Company; "President," "Board of Directors," and "Relief De-

partment" or "Department," will mean the President, Board of Directors and Relief Department, respectively, of said Company; "Relief Fund," "Advisory Committee" or "Committee," "Superintendent," "Medical Director" and "Medical Examiner," will mean the Relief Fund, Advisory Committee, Superintendent, Medical Director and Medical Examiner, respectively, of said Relief Department.

2. The object of the Department is the establishment and management of a fund, to be known as the "Relief Fund," for the payment of definite amounts to employes contributing thereto, who are to be known as "members of the Relief Fund," when under the Regulations they are entitled to such payment by reason of disability, or, in the event of their death, to the relatives or other beneficiaries designated by them with the approval of the Superintendent.

3. The Relief Fund will consist of voluntary contributions from members thereof, income derived from investments and from interest paid by the Company, and money advanced by the Company when necessary to pay benefits as they become due.

4. The Company shall have general charge of the Department, guarantee the fulfillment of its obligations as determined by these Regulations, take charge of all moneys and securities belonging to the Relief Fund and be responsible for their safekeeping, pay into the fund interest at the rate of four per cent per annum on monthly balances in its hands, supply the necessary facilities for conducting the business of the Department, and pay all the operating expenses thereof.

5. There shall be an Advisory Committee, constituted as follows:

The General Manager of the Chicago, Burlington & Quincy Railroad shall be ex officio a member and Chairman of the Committee.

The other members of the Committee shall be chosen annually, in November or December, to serve for one year from the 1st day of January next succeeding, or until their successors are chosen, as follows:

One-half shall be chosen by the Board of Directors, and one-half by the employes, members of the Relief Fund, from among themselves by Electoral Divisions, each Electoral Division choosing one representative. The number of Electoral Divisions and extent of each shall be from time to time determined by the President.

6. The members of the Committee chosen by the members of the Relief Fund shall be elected by ballot, the vote being taken and certified under oath by tellers selected by the Committee.

In balloting for members of the Committee each member of the Relief Fund shall be entitled to cast one vote.

For the Committee to serve during the first fiscal year, or during the remainder of any fiscal year after the termination of any agreement for associated administration as hereinafter provided, the members to represent the contributing employes shall be designated by the President.

In the event of the termination of service of any member of the Committee or of his withdrawal from membership in the Relief Fund, his membership on the Committee shall thereupon terminate.

Any vacancy among the members elected by the contributing em-

ployes shall be filled by the succession to the position of the employe on the same Electoral Division who received the next highest number of votes to the retiring member.

Any vacancy among the members chosen by the Board of Directors shall be filled by appointment by the President.

Such members, and the members to be chosen by the Board of Directors for the original Committee, shall serve until their successors are chosen as above provided.

The Superintendent shall be Secretary of the Committee.

7. Should any other corporation or corporations, associated in interest with this Company, adopt or have adopted Regulations establishing a Relief Department or Relief Departments, similar to the one hereby established, this Company may associate itself with such corporation or corporations in the administration of its and their Relief Departments, when so authorized by the respective Boards of Directors of this and said corporation or corporations.

Such association shall be evidenced by agreement or agreements duly executed, authorizing, among other things, the constitution of a joint Advisory Committee, to be chosen, as and in the manner therein prescribed, by the several parties thereto and their employes, either by separate action in behalf of each of said parties, or by the united action of two or more of them as to any member or members of said Advisory Committee; the original Advisory Committee to be constituted and vacancies occurring thereafter to be filled in such manner as shall be prescribed in said agreement or agreements.

In the event of any association as aforesaid, the functions and powers herein given to and vested in the Advisory Committee created as hereinbefore provided, shall, during the continuance of said agreement or agreements, be transferred to and vested in the Advisory Committee constituted as prescribed in said agreement or agreements, chosen or designated as therein directed, and so much of the Regulations of the Relief Department herein provided for as relates to the constitution of an Advisory Committee consisting solely of officers and employes of this Company shall be suspended, with the understanding, however, that upon the termination of such agreement or agreements the Advisory Committee herein provided for, constituted as herein prescribed, shall reassume the functions and duties herein committed to it.

8. The Committee shall have general supervision of the operations of the Department and see that they are conducted in accordance with the Regulations.

The Committee shall hold stated meetings once in three months, at such time and place as they shall determine, and shall meet at other times at the call of the Chairman.

It shall be the duty of the Chairman to call special meetings of the Committee upon the written request of three of its members.

9. The Superintendent shall have charge of all business pertaining to the Department. He shall employ such clerks and other assistants as may be necessary, prescribe the forms and blanks to be used, certify all bills and pay-rolls of the Department, furnish to the Committee such reports as they may require, decide all questions

properly referred to him, and exercise such other authority as may be conferred upon him by the President or the Committee.

10. There shall be an Assistant Superintendent, who shall be possessed of all the powers of the Superintendent in his absence, and shall at all times perform such duties as may be assigned to him by the Superintendent.

11. There shall be a Medical Director, who shall, subject to the approval and control of the Superintendent, appoint Medical Examiners, assign them to districts, direct their work and have general supervision of the medical and surgical affairs of the Department. The Medical Director may be the same person as the Superintendent or Assistant Superintendent.

The Superintendent, Assistant Superintendent and Medical Director shall be designated by the President.

12. The Medical Examiners shall make the required physical examination of applicants for membership in the Relief Fund, prepare applications, report the condition of sick or injured members, decide when members are disabled, and when they are able to work, certify bills for surgical treatment, perform such other duties as may be required of them by the Medical Director, and conform to such rules as he may establish.

13. Wherever used in these Regulations the words "Medical Officers" shall be held to mean the Medical Examiner in charge of any case, and the Medical Director.

14. The moneys received for the Relief Fund shall be held by the Company in trust for the Department. The Committee, with the approval of the Board of Directors, may invest money not required for current use. The securities for such investments shall be in the name of the Company "in trust for the Relief Department." To maintain a reasonable cash balance in the Fund, the Company may sell or secure a loan upon such securities; but if there are no securities upon which money may be realized or no money in the Relief Fund the Company shall temporarily advance, without charge to the Fund, such money as is necessary to meet the obligations of the Department as they become due.

15. The fiscal year of the Department shall begin with the 1st day of January of each year.

The condition of the Relief Fund at the close of each fiscal year shall be audited and reported on by competent person or persons selected for that purpose by the members of the Committee who represent the members of the Relief Fund.

16. Amendments to the Regulations of the Department may be proposed to the Committee, at any meeting, by any member of the Committee. Amendments so proposed may be acted upon only at a subsequent meeting; but no amendment shall be operative unless adopted by vote in the affirmative of a majority of the whole Committee, approved by the Board of Directors, and duly announced by the Superintendent; and any amendment so adopted, approved and announced shall be binding upon the Company and the members of the Relief Fund and all persons claiming through them from the date specified in the announcement of the same.

Membership.

17. All employes of the Company who, under the Regulations, are contributors to the Relief Fund, shall be designated as "members of the Relief Fund."

18. In referring to employes of the Company, the word "service" shall mean employment by this Company, or by any Company associated with it in the administration of their Relief Departments; and the service of any employe shall be regarded as continuous for the time during which he has been continuously in the employ of this Company and any one or more of such associated Companies.

19. There shall be five classes of members. The highest class in which an employe may be a member, shall be determined by his regular or usual monthly pay, as follows:

Monthly Pay.	Highest Class.
Less than $35	1st.
$35.00 or more, but less than $55.00	2d.
55.00 " " " " " 75.00	3d.
75.00 " " " " " 95.00	4th.
95.00 " "	5th.

For employes paid by the hour, trip, piece, or in any other way than by the month, the highest class shall be determined by the usual amount of earnings in a month.

For persons in the service of this Company, and of one or more of the Companies associated with it in the administration of their Relief Departments, the highest class shall be determined by the total pay received from all such Companies, and the membership shall be in the Relief Fund of this Company, if the largest amount is received therefrom.

20. No employe shall be required to become a member of the Relief Fund.

21. Any employe not over forty-five years of age may, upon passing a satisfactory medical examination, and upon approval of his application by the Superintendent, become a member in the highest class allowed by his pay, or in any lower class, with or without additional death benefits of the first class not greater in the aggregate than three times the death benefit of the class he enters.

Any person over forty-five years of age who becomes an employe of this Company in consequence of the purchase or lease of the property of any other Company may, at any time within two months of the date of his employment by this Company, upon passing a satisfactory medical examination and upon approval of his application by the Superintendent, become a member in the highest class allowed by his pay, or in any lower class, with or without additional death benefits of the first class not greater in the aggregate than the death benefit of the class he enters.

22. Any member not over forty-five years of age may, upon passing a satisfactory medical examination, and upon approval of his application by the Superintendent, change to any higher class allowed by his pay or take additional death benefits of the first class

to such extent that the aggregate of additional death benefits shall not exceed three times the death benefit of the class in which he is or becomes a member.

Any member or applicant for membership may, upon approval of his application by the Superintendent, take extra accident death benefits of the first class to such extent that the aggregate of extra accident death benefits shall not exceed twice the death benefit of the class in which he is or becomes a member; provided, however, that title to such extra accident death benefit shall cease upon termination of service or when title to disability benefits has expired.

Any member who has been debarred from taking a higher class when his pay was increased, by reason of his being over forty-five years of age, or any member whose pay is increased enough after he is forty-five years of age to entitle him to membership in a higher class may, upon passing a satisfactory medical examination and upon approval of his application by the Superintendent, change to any higher class allowed by his pay; provided, however, that application for such change be made within three months of the time this regulation becomes effective or of such increase of pay.

23. Any member may, upon executing the proper form of application, change to a lower class, or relinquish all or a part of his additional or extra accident death benefits.

24. When a member voluntarily changes to a lower class, the amount of the death benefit he retains shall not exceed the maximum of that class.

25. An employe can not remain a member in a class higher than that allowed by his pay, but when the pay of a member is reduced he shall not be required to make any change in the amount of his death benefit other than extra accident death benefit; and any excess of death benefit above that to which he is entitled by his new class shall be treated as additional death benefit.

If a member declines to effect a proper reduction of class under the foregoing, the Superintendent shall have authority to cancel his membership.

26. When a member of the Relief Fund of any one of the Companies associated with this Company in the administration of their Relief Departments is transferred to the service of this Company, his membership shall thereby be transferred to the Relief Fund of this Company.

27. Any member may withdraw from the Relief Fund at the end of any month upon giving notice before the 25th of that month on the prescribed form of withdrawal notice, which will be furnished by his timekeeper upon request.

28. Any member who is furloughed, suspended or otherwise temporarily relieved from the service for a period not exceeding sixty days, may retain his membership during such absence by paying his contributions in advance. If absence is for a longer period, membership may only be retained in respect of death benefit, unless the member previously arranged otherwise with the Superintendent. His Division Officer or Head of Department shall notify the Superintendent at the beginning of such absence, specifying the time set

for return to duty, and if at that time the member does not return to duty his membership in the Relief Fund shall thereupon terminate, unless otherwise previously arranged by him with the Superintendent.

29. When a member resigns from the service, or leaves the service without notice, or is relieved or discharged therefrom, his membership in the Relief Fund shall terminate with his employment, and he shall not be entitled to any benefits for time thereafter, except such as he may be entitled to by reason of disability beginning and reported before, and continuing without interruption to and after such termination of employment; provided, however, that any member who has been continuously in the service three years, and a member of the Relief Fund one year immediately preceding termination of his employment, may continue his membership thereafter, but only in respect of the minimum death benefit which he has held at any time during the last year, or of any smaller amount, upon making supplementary application therefor on the prescribed form before termination of employment, or within five days thereafter.

When a member contributing for death benefit only after termination of service is again reëmployed he shall thereupon resume full membership if physically qualified.

A person entitled to benefits for time after termination of service shall not be entitled to benefits on account of sickness beginning or injury occurring during such time; nor on account of death occurring in such time, unless directly due to the sickness or injury and occurring during the disability existing at the time of such termination of service, or unless he continues his membership in respect of death benefit only in accordance with the foregoing.

30. When a member absents himself from duty for a period of six days without the permission of his employing officer previously obtained, or without giving, meanwhile, reason for absence, satisfactory to his employing officer, he shall be held to have left the service without notice, and his membership shall be held to have terminated on the day preceding such absence. If such member be reinstated in the service he may also be reinstated in membership upon approval of the Superintendent.

31. If a member is relieved from service and is afterward reëmployed, he may again become a member of the Relief Fund, although then over forty-five years of age, upon application within sixty days of the time of reëmployment, upon passing a satisfactory medical examination in which his physical condition at the termination of former employment will be given due consideration, and upon approval of his application by the Superintendent.

Applications.

32. Membership in the Relief Fund shall be based upon an application in the following form:

Application for Membership in the Relief Fund of the Relief Department of the Chicago, Burlington & Quincy Railway Company.

To the Superintendent of the Relief Department of the Chicago, Burlington & Quincy Railway Company:

I, —— ——, of — in the county of — and State of —, now employed by the Chicago, Burlington & Quincy Railway Company, do hereby apply for membership in the Relief Fund of the Relief Department of said Company, and consent and agree to be bound by the Regulations of said Relief Department, which Regulations I have read or have had read to me, and by any other regulations of said Department hereafter adopted and in force during my membership, and by any agreement now or hereafter made by the said Company with any other corporation or corporations now or hereafter associated with it in the administration of their Relief Departments.

I also agree, That the said Company, by its proper agents, and in the manner provided in said Regulations, shall apply, as a voluntary contribution from any wages earned by me under said employment, the sum of — ($—/100) per month, for the purpose of securing the benefits provided in the Regulations for a member of the Relief Fund of the — class, with — additional death benefit of the first class, and — extra accident death benefit of the first class.

Unless I shall hereafter otherwise designate, in writing, with the approval of the Superintendent of the Relief Department, death benefit shall be payable to my wife (husband), if I am married at the time of my death; or, if I have no wife (husband) living, then to my children collectively, each to be entitled to an equal share, including, as entitled to the parent's share, the issue of any deceased child; or, if there be no children or such issue living, then to — if living; and if not living, then to my father and mother jointly, or the survivor; or, if neither be living, then to my next of kin, payment in behalf of such next of kin to be made to my legal representatives; or, if there be no such next of kin, the death benefit shall lapse, and the amount thereof shall remain as a part of the Relief Fund, without claim for the same.

Any funeral or other expenses incident to my death, which shall have been paid by the Superintendent of the Relief Department, in accordance with the Regulations, shall be held to be in part payment of the said death benefit, and shall be deducted from the total amount thereof before payment to the person or persons entitled to receive the same.

I also agree, That, in consideration of the amounts paid and to be paid by said Company for the maintenance of said Relief Department, and of the guarantee by said Company of the payment of said benefits, the acceptance by me of benefits for injury shall

operate as a release and satisfaction of all claims against said Company, and all other Companies associated therewith in the administration of their Relief Departments, for damages arising from or growing out of said injury; and further, in the event of my death no part of said death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the Superintendent of said Relief Department, of all claims against said Relief Department, as well as against said Company, and all other Companies associated therewith as aforesaid, arising from or growing out of my death, said releases having been duly executed by all who might legally assert such claims; and further, if any suit shall be brought against said Company, or any other Company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to me, the benefits otherwise payable, and all obligations of said Relief Department and of said Company created by my membership in said Relief Fund, shall thereupon be forfeited without any declaration or other act by said Relief Department or said Company.

I also agree, That this application, upon approval by the Superintendent of the Relief Department, shall make me a member of the Relief Fund, on and from the date specified in such approval, and constitute a contract between myself and the said Company, and that the same shall not be avoided by any change in the character of my service, or locality where rendered, while in the employment of said Company, nor by any change in the amounts applicable from my wages to the Relief Fund, which I may hereafter consent to, and that the agreement that the above-named amounts shall be appropriated from my wages shall apply also to any other amounts which I may agree to pay under the provisions of said Regulations, by reason of changes made as aforesaid, and shall constitute an appropriation and assignment in advance of such portions of my wages, to the said Company in trust, for the Relief Fund, for the purpose of maintaining my membership therein, which assignment shall have precedence over any other assignment by me of my wages, or of any claim upon them on account of liabilities incurred by me.

I also agree, That my being transferred to the service of any other Company associated with said Company in the joint operation of their Relief Departments shall operate to transfer my membership in the Relief Fund of said Company to the Relief Fund of the Company to the service of which I am transferred, and that this application and contract shall thereupon become binding between me and such other Company, the same as if originally made by me with such other Company.

I also agree, For myself and those claiming through me, to be especially bound by the Regulation providing for final and conclusive settlement of all claims for benefits or controversies of whatsoever nature by reference to the Superintendent of the Relief Department, and an appeal from his decision to the Advisory Committee.

I certify, That I am correct and temperate in my habits; that, so far as I am aware, I am now in good health, and have no injury or

disease, constitutional or otherwise, except as shown on the accompanying statement made by me to the Medical Examiner, which statement shall constitute a part of this application.

I also agree, That any untrue or fraudulent statement made by me to the Medical Examiner, or any concealment of facts in this application, or any attempt on my part to defraud or impose upon said Relief Fund, or my resigning from, or leaving the service of the said Company, or my being relieved or discharged therefrom, shall forfeit my membership in the said Relief Fund, and all benefits, rights or equities arising therefrom, except that such termination of my employment shall not (in the absence of any of the other foregoing causes of forfeiture) deprive me of any benefits to the payment of which I may be entitled by reason of disability beginning and reported before and continuing without interruption to and after such termination of my employment, nor of the right to continue my membership in respect of death benefit only, as provided in said Regulations.

In Witness Whereof, I have signed these presents at —— in the county of ——, State of ——, this — day of ——, A. D. 19—, this application to take effect immediately, or on such subsequent date as may be designated by said Superintendent.

The following changes made before execution:

—— ——.

Witness:

—— ——.

The foregoing application is approved at the office of the Superintendent of the Relief Department at Chicago, in the county of Cook, State of Illinois, this — day of ——, A. D. 19—, to take effect the — day of ——, A. D. 19—.

—— ——,

Superintendent of the Relief Department.

The last application in the foregoing form, or in a corresponding earlier form, which shall have been made by an employe, shall be known as his "Principal Application."

Upon the approval of the principal application of an employe by the Superintendent, he shall be a member on and from the date specified in such approval, and the Superintendent shall issue to him a certificate of membership.

33. The following form of supplementary application shall be used by members applying to enter higher or lower classes, or for additional or extra accident death benefit or reduction therein.

Supplementary Application.

To the Superintendent of the Relief Department of the Chicago, Burlington & Quincy Railway Company:

I, ——, of ——, in the county of ——, and State of ——, now employed by the Chicago, Burlington & Quincy Railway Company, and a member of the Relief Fund of the Relief Department thereof,

by virtue of my former principal application, under and subject to the conditions recited in said principal application and upon the terms thereof, unless, and only so far as, herein modified, do hereby make this supplementary application for the following, namely: to change my membership in said Relief Fund from — class with — additional death benefits of the first class and — extra accident death benefits of the first class, to — class with — additional death benefits of the first class and — extra accident death benefits of the first class; my contribution after such change made to be at the rate of — ($—/100) per month; this application to take effect immediately, or on such subsequent date as may be designated by said Superintendent.

(*a*) I certify, That I am correct and temperate in my habits; that, so far as I am aware, I am now in good health, and have no injury or disease, constitutional or otherwise, except as shown in the accompanying statement made by me to the Medical Examiner, which statement shall constitute a part of this application.

I hereby agree, That any untrue or fraudulent statement made by me to the Medical Examiner, or any concealment of facts in this application, shall make this supplementary application void and of no effect.

In Witness Whereof, I have signed these presents at —— in the county of ——, State of ——, this — day of —— A. D. 19—.

The following changes made before execution:

—— ——.

Witness:

—— ——.

The foregoing supplementary application is approved at the office of the Superintendent of the Relief Department at Chicago, in the county of Cook, State of Illinois, this — day of —— A. D. 19—, to take effect the — day of —— A. D. 19—.

—— ——,

Superintendent of the Relief Department.

NOTE.—(*a*). For employes who are not required to pass a medical examination upon making a supplementary application, the underlined words will be omitted.

If any applicant for membership or for change in membership has physical defects which would preclude the approval of his application, if presented unconditionally, his application may nevertheless be approved, provided that he executes an agreement in writing, satisfactory to the Superintendent, to the effect that he shall not be entitled under his membership to any benefits for disability caused by, arising from or growing out of such defects, such agreement to be attached to and to be a part of his said application, and such modification of the prescribed forms of application is hereby authorized.

34. The application of a married woman must be signed also by

her husband, and that of a minor by the father or legal guardian, unless otherwise directed by the Superintendent.

Contributions.

35. The word "contribution" wherever used in these Regulations shall be held and construed to refer to such designated portion of the wages payable by the Company to an employe, as he shall have agreed, in his application, that the Company shall apply for the purpose of securing the benefits of the Relief Fund; or to such cash payment as it may be necessary for a member to make for said purpose.

36. Contribution for full membership shall be made monthly in advance, at the following rates: First class, 75 cents per month; second class, $1.50; third class, $2.25; fourth class, $3.00, fifth class, $3.75.

The monthly rate of contribution for each extra accident death benefit of the first class shall be 15 cents.

The monthly rates of contribution for each additional death benefit of the first class shall be determined by the age of the member at the time of taking the additional death benefit and shall be as follows: For a member not over 45 years of age, 30 cents; over 45 and not over 60 years of age, 45 cents; over 60 years of age, 60 cents.

Contribution for death benefit only shall be made quarterly in advance and shall be based on the age of the member at the time of taking such death benefit; and the rate for each death benefit of the first class, contained in the death benefit of his class, shall be the same as herein fixed for each additional death benefit of the first class.

37. Contribution for any month will be due on the first day of that month, and will ordinarily be deducted from the member's wages on the pay-roll of the preceding month.

If a member's contribution is omitted from the pay-roll in error, the fact that such deduction has not been made shall not debar him or his beneficiary from benefits to which they otherwise would be entitled.

When a member has no wages on the pay-roll, any contribution due from him must be paid in cash in advance, otherwise he will be in arrears. A member in the service shall make such cash payment to the Superintendent through his superior officer; a member contributing for death benefit only shall make such cash payment to the Superintendent direct.

38. Benefits shall not be due on account of disability beginning or death occurring while a member is in arrears.

When a member is in arrears for two months his membership shall thereupon cease.

If a member resumes work for the Company before he has been in arrears two months he shall be protected from the time of resuming work, and the arrears may be paid on the next pay-roll.

39. No deduction on account of contribution to the Relief Fund shall be made from the pay of an applicant for membership, and no increase of deductions shall be made from the pay of an applicant for increase of class or additional death benefit without instructions

from the Superintendent, and any deduction made to the contrary shall be held to have been made in error, and shall be refunded, if the application is not approved.

40. When a member recovers from disability, his contribution for the remainder of the month in which he recovers, if not already paid, together with his contribution for the following month, shall be deducted on the pay-roll of the month in which he recovers.

41. In determining contribution for part of a month, the amount for each day shall be one-thirtieth of the amount for one month, and the amount for any other part of a month shall be determined by multiplying the amount for one day by the number of days in such part, adding to make even cents when fractions occur.

42. In determining the number of days in the part of a month for which contribution is to be collected, the day on which an application takes effect and the day after the recovery of a member from disability shall be included.

43. A member shall not make contribution for any time of disability beyond the end of the month in which disability begins, except as specifically provided in the Regulations. While wages are paid during disability the usual contribution shall be made.

If a disabled member declines to accept benefits, he shall contribute for, and be entitled to, death benefit only, while disabled. If such member afterwards accepts the benefits to which he is entitled a proper adjustment of contribution shall be made.

44. When a member's service terminates there shall be due him as refund any excess of contribution he may have made above what is necessary to adjust his account up to, but not including the last day of service.

Any refund of contribution due at the termination of a member's service shall be payable upon application therefor by the member, and shall be made by time check or otherwise, in conformity with the financial methods of the Company.

Disability.

45. Wherever used in these Regulations the word "disability" shall be held to mean physical inability to work, by reason of sickness or accidental injury, and the word "disabled" shall apply to members thus physically unable to work. The decision as to when members are disabled and when they are able to work, shall rest with the medical officers of the Department.

The decision as to whether disability at any time shall be classed as due to sickness or due to accident, and as to whether any disability shall be considered a relapse or an original disability, shall rest with the medical officers of the Department.

When a disability is classed as a relapse the time of such disability shall be considered a part of the original disability in determining the length of time for which benefits may be drawn and the rate at which benefits are payable.

In considering the question of disability, subjective symptoms or alleged feelings will be given due weight, but these in themselves,

unsupported by objective and discoverable symptoms, shall not entitle a member to be considered disabled.

Benefits.

The following benefits will be paid to members or beneficiaries entitled thereto in accordance with the provisions of these Regulations:

Accident Benefits.

46. Payment for each day of disability classed as due to accident for a period not longer than fifty-two (52) weeks, as follows: To a member of the first class, 50 cents; second class, $1; third class, $1.50; fourth class, $2; fifth class, $2.50; and at half these rates thereafter during the continuance of disability. Also, payment to or in behalf of the member of such an amount for necessary surgical treatment as may be approved by the Medical Director. No member shall have authority to contract any bills against the Department, and nothing herein shall be held to mean or imply that the Department shall be responsible for the payment of such bills as a member may contract or his surgeon may charge. Bills for surgical attendance, to be considered by the Department, must be made out against the member and must be itemized.

To establish a claim for accident benefits the accident must be reported immediately upon its occurrence and there must be external positive and visible evidence of physical injury by accident sufficient to cause immediate disability. In cases of alleged sprain, strain, wrench and the like, where physical proof of disabling injury is lacking, the member must furnish substantiated history, satisfactory to the Superintendent, of violence accidentally inflicted sufficient and liable to cause disabling injury, otherwise accident benefits will not be allowed.

When a member meets with any accident from which disability may result and on account of which he wishes to reserve the right to claim accident benefits, he shall report the accident to his employing officer immediately upon its occurrence and also report in person to the Medical Examiner the same as is provided in these Regulations in case of actual disability.

If a member receives accidental injuries producing the immediate severing of, or necessitating, in the opinion of the medical officers of the Department, the amputation of, a hand or a foot at or above the wrist or ankle, he may either receive daily benefits and payment of surgical bills as above provided, also an artificial limb when such can be worn, or, in lieu thereof and in full of all claims or demands of whatsoever nature against the Department and the Company, and upon executing a release to this effect satisfactory to the Superintendent, he may receive the following: For a member in the first class, $800; second class, $1,400; third class, $2,000; fourth class, $2,600; fifth class, $3,200; and twice these amounts in case of loss of both hands or both feet or of one hand and one foot. Any such member who has been in receipt of daily benefits on account of such

injury, and who has not yet been reported able to work by the Medical Examiner, may receive in full settlement the above fixed amounts, less the amount already paid to and for him on account of such injury, upon execution of a release as above provided.

Sick Benefits.

47. Payment for each day, except for the first six days, of disability classed as due to sickness, for a period not longer than fifty-two (52) weeks, at the same rates as for accident benefits, and at half such rates for an additional period of fifty-two (52) weeks.

In cases of members who have received sick benefits prior to March 1, 1904, the time for which they may become entitled to further sick benefits after said date shall be computed as follows: Each day of sickness in excess of fifty-two (52) weeks for which benefits have been so paid shall be counted as two days, and the number so found shall be deducted from 364, and the remainder shall be the number of days for which the member may become entitled to further sick benefits under these regulations.

When a member shall have received benefits for fifty-two (52) weeks at full rates and benefits for fifty-two (52) weeks at half rates in the aggregate of all disabilities by sickness from the Relief Fund of this Company and of all other Companies now or heretofore associated therewith in the administration of their Relief Departments, he shall not be entitled to further disability benefits.

To establish a claim for sick benefits there must be positive evidence of acute or constitutional disease sufficient to cause disability.

Disability resulting from infection of a cut, abrasion, scratch, puncture or other wound, or from any injury, not immediately disabling and not reported at the time of the occurrence of the accident causing the injury, or from poison however taken into or acting upon the body, or from any overdose of medicine or drug taken by mistake, or from surgical operation necessary for the removal of some defect, which would otherwise probably produce disability, or from sunstroke or frostbite, shall be classed as due to sickness.

Death Benefits.

48. Payment, in accordance with the conditions prescribed in the Regulations, upon the death of a member, as follows: To the beneficiary of a member of the first class, $300; second class, $600; third class, $900; fourth class, $1,200; fifth class, $1,500. Also, payment of $300 for each additional death benefit of the first class and payment of $300 for each extra accident death benefit of the first class to which the beneficiary is entitled.

To establish a claim for extra accident death benefit, the death must be shown to have occurred solely by reason of, and within thirty days after, the receipt of an accidental injury; and there must be external, positive and visible evidence of physical injury by accident sufficient to cause death.

49. If an employe, entitled to become a member upon passing a

satisfactory medical examination, and who has not previously been examined and rejected, shall have executed a prescribed form of "Notice of Application," but shall not have had opportunity to be examined before the date specified thereon for his application to take effect, he shall be protected by such notice of application, under and in accordance with the terms of the prescribed form of principal application from said date until he shall have had opportunity to be examined; provided, however, that he shall only be entitled to benefits payable on account of injury or death caused solely by accident happening in such interval, and if his principal application is not approved, his rights and obligations in the Relief Fund shall cease from the time of medical examination; and if he shall refuse or neglect to be examined when opportunity for examination is offered, his rights and obligations in the Relief Fund shall thereupon cease.

An applicant, protected in accordance with the foregoing against accident only, shall contribute at half rate while so protected. The principle of the foregoing shall also apply in case of notice of application for higher class or additional death benefit.

50. A member shall not be entitled to receive benefits continuously for more than fifty-two weeks at full rates for any disability caused by accident or sickness or by a succession or combination of accident and sickness. In case of disability from accident alone and in case of succession of accident disability upon sickness disability, benefits shall be payable at half rates after said fifty-two (52) weeks. In case of succession of sickness disability upon accident disability, benefits payable at half rates shall not exceed an additional fifty-two (52) weeks.

A member not entitled to further sickness benefits under this regulation shall contribute for, and be entitled to, death benefit only until reported able to work by the Medical Examiner, otherwise his membership shall cease.

A member shall not be entitled to benefits for disability from any cause while still disabled from a preceding cause.

In case of relapse, in sickness disability, occurring within two weeks, or of succession of sickness disability upon an accident disability which lasted six days or more, the first six days shall not be deducted in computing time of sick benefits; and where such immediately preceding accident disability lasted five days or less, the number of days to be deducted shall be six, less the number of days of such accident disability.

51. A member who has received sick benefits to the full extent contemplated by these Regulations may retain his membership in respect of death benefit only by contributing for the same, such contribution to begin at the expiration of his right to sick benefits, otherwise his membership shall cease.

52. In any case of grave injury or chronic sickness where the member desires to accept a lump sum in lieu of the benefits which might become due to him or on his account, and in full of all obligations of the Department or Company arising from his membership or service, the Superintendent shall have authority to make full

and final settlement with such member on such terms as may be agreed upon in writing. All such settlements shall be reported to the Committee at their next meeting.

53. Benefits on account of continued disability will be paid monthly. Benefits for short periods of disability will be paid as soon as the amounts due can be ascertained.

Benefits payable on account of the disability of a member shall be payable only to such member, or in accordance with his written order when approved by the Superintendent, or to his legal representative; but payment for surgical treatment may be made to the attending surgeon.

When in the opinion of the Superintendent a member is mentally incompetent, disability benefits due to him may, at the discretion of the Superintendent, be paid to his wife or to some member of his family or to his employing officer, for the use and benefit of the member, and such payments shall be a bar to any subsequent claim on the part of the member or his legal representative for amounts so paid.

54. Death benefit, together with any unpaid disability benefits shall be payable to the beneficiary of a deceased member upon proof of claim and execution and delivery of the necessary releases in conformity with these Regulations.

A part of the death benefit, not to exceed two hundred dollars ($200), may, at the discretion of the Superintendent, be paid before final settlement, to meet funeral or other urgent expenses incident to the death of a member.

Miscellaneous.

55. When a member becomes disabled he shall notify his timekeeper immediately, or cause him to be so notified. In reporting disability the member shall also give his house address. If he fails to give notice until he recovers he shall not be entitled to benefits unless he proves his disability to the satisfaction of the Superintendent, and gives satisfactory reason for failure to give notice. If he gives notice during his disability, but delays in so doing, he shall not be considered disabled before the day on which notice is given, unless he proves his disability before that day to the satisfaction of the Superintendent, and gives satisfactory reason for delay in giving notice.

When a member becomes disabled it shall also be his duty, unless incapacitated therefrom by his disability, to report immediately in person to the Medical Examiner at his office during office hours, if the member resides or becomes disabled in or goes to a town where there is a Medical Examiner; it shall also be the duty of a disabled member not confined to the house by disability, to report at the Medical Examiner's office from time to time, as requested, and to keep any other appointments made by the Examiner. Members who avoid the Medical Examiner, or neglect to report or keep appointments as herein provided, shall not be entitled to benefits.

If a member, who has been reported by the Medical Examiner as able to work, is not able to work on the day set, he shall immediately notify his employing officer to that effect and shall immediately communicate with the Medical Examiner, and report to him in person if possible, otherwise he shall not be considered disabled on or after the day set for his return to work.

56. When a member becomes disabled during suspension, furlough or other leave of absence, and while away from his usual place of residence when on duty, he shall not be entitled to benefits, unless, in addition to reporting his disability immediately, as required by the Regulations, he proves his disability while absent to the satisfaction of the Superintendent.

57. When a disabled member wishes to absent himself for any length of time from his usual place of residence when on duty, he shall first see the Medical Examiner and obtain his written approval of absence for a specified time; he shall furnish to the Medical Examiner satisfactory certificates of disability during absence, keep him informed of his address and report to him immediately upon his return; and if such disabled member goes away and remains away without previously consulting the Medical Examiner and obtaining his written approval of absence for a specified time, he shall not be entitled to benefits for any time of absence unless he proves his disability while absent to the satisfaction of the Superintendent, and gives satisfactory reason for failure to consult the Medical Examiner before leaving.

58. Members shall not be entitled to benefits for time during which wages are paid them by the Company. In computing benefits, the time of disability shall be considered as beginning upon the first day upon which no wages or less than one-half day's wages are paid, because of disability, and this day shall be called "first day wages not paid."

59. Benefits shall not be payable for disability directly, indirectly or partly due to intoxication or to use of alcoholic liquors as a beverage, or to immoderate use of stimulants or narcotics, or to unlawful acts or immoralities, or to venereal disease however contracted, or to the results thereof, or to urethritis, orchitis, epididymitis stricture or glandular swelling or abscess in the groin, however caused, or to fighting, unless in self-defense against unprovoked assault, or to other encounter such as wrestling, scuffling, fooling and the like, or to injury received in any brawl, or in any liquor saloon, gambling house or other disreputable resort.

During disability coming under this Regulation a member shall contribute for and be entitled to death benefit only.

60. Members shall not be entitled to benefits if they decline to permit the Medical Examiner to make or to have made by any other physician, such examinations as he may deem necessary to ascertain their condition when disability is claimed.

Disabled members must take proper care of themselves and have suitable treatment; benefits will be discontinued if members refuse or neglect to comply with the recommendations of the medical officers of the Relief Department as to proper care and treatment.

61. Benefits shall be paid in conformity with the financial methods of the Company, and on orders drawn by the Superintendent (or such other person as may be designated by the President) upon his receiving satisfactory certificates respecting the claims and such releases as may be required by him.

62. Any claim for disability benefits, to be valid, must be made within sixty days from the time when such benefits accrued, and any claim for death benefit, to be valid, must be made within two years from the death of the member.

63. Members shall keep their foremen or timekeepers informed of their addresses.

A member's place of residence when on duty shall be held to be at the last address given to his timekeeper.

Members who have left the service, but retain their membership in respect of death benefit only, shall keep the Superintendent informed of their addresses by notice in writing, and the Superintendent shall promptly acknowledge notification of any address or change of address.

64. In case of injury to a member he may elect to accept the benefits in pursuance of these Regulations, or to prosecute such claims as he may have at law against the Company or any Company associated therewith in the administration of their Relief Departments.

The acceptance by the member of benefits for injury shall operate as a release and satisfaction of all claims against the Company and all other Companies associated therewith as aforesaid, for damages arising from or growing out of such injury; and further, in the event of the death of a member no part of the death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the Superintendent, of all claims against the Relief Department, as well as against the Company and all other Companies associated therewith as aforesaid, arising from or growing out of the death of the member, said releases having been duly executed by all who might legally assert such claims; and further, if any suit shall be brought against the Company or any other Company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to a member, the benefits otherwise payable and all obligations of the Relief Department and of the Company created by the membership of such member in the Relief Fund shall thereupon be forfeited without any declaration or other act by the Relief Department or the Company; but the Superintendent may, in his discretion, waive such forfeiture upon condition that all pending suits shall first be dismissed.

The payment by the Company, or any Company associated therewith as aforesaid, of any amount in compromise of a claim for damages arising from or growing out of an injury to, or the death of, a member, shall preclude any and all claims for benefits from the Relief Fund arising from or growing out of such injury or death.

65. In any controversy, claim, demand, suit at law or other pro-

ceeding between any member, his beneficiary or legal representative and the Company or the Relief Department, the certificate of the Superintendent as to any facts appearing in the records of the Relief Department or of the Company, or that any writing is a copy taken from said records or of any instrument on file in said Department or with the Company, or that any action has or has not been taken by the Committee or the Board of Directors of the Company, shall be prima facie evidence of the facts therein stated.

66. All questions or controversies of whatsoever character arising in any manner, or between any parties or persons in connection with the Relief Department or the operation thereof, whether as to any claim for benefits preferred by any member or his legal representative or his beneficiary or any other person, or whether as to the construction of language or meaning of the Regulations, or as to any writing, decision, instruction or acts in connection with the operation of the Department, shall be submitted within sixty days of the time of the decision from which an appeal is taken, to the determination of the Superintendent, whose decision shall be final and conclusive thereof, unless an appeal from such decision shall be taken to the Committee within thirty days after notice of such decision to the parties interested.

When an appeal is taken to the Committee it shall be heard by said Committee without further notice at their next stated meeting, or at such future meeting or time as they may designate, and shall be determined by vote of the majority of a quorum, or of any other number not less than a quorum of the members present at such meeting, and the decision arrived at thereon by the Committee shall be final and conclusive upon all parties without exception or appeal.

Explanatory.

The following table shows the monthly pay admitting to the several classes, the rates of contributions and disability benefits, and the minimum and maximum death benefit of any class.

No one over forty-five years of age can become a member, change to a higher class, or take additional death benefit except as is provided in Regulations Nos. 21 and 22.

Age is taken at nearest birthday.

In addition to the death benefit shown in this table, members may take extra accident death benefits not greater in the aggregate than twice the death benefit of their class, without regard to age or physical condition. The monthly rate of contribution for each extra accident death benefit is 15 cents. This allows a member in the first class to carry extra accident death benefit of $600; second class, $1,200; third class, $1,800; fourth class, $2,400; fifth class, $3,000.

Total Death Benefit.	Any amount. 1st class. Benefits 50c. per day.				$35.00 or more. 2d class. Benefits $1.00 per day.				$55.00 or more. 3d class. Benefits $1.50 per day.				$75.00 or more. 4th class. Benefits $2.00 per day.				$95.00 or more. 5th class. Benefits $2.50 per day.			
	No. of add. death benefits	Ages. Not over 45 years	Ages. Over 45 and not over 60 years	Ages. Over 60 years.	No. of add. death benefits.	Ages. Not over 45 years.	Ages. Over 45 and not over 60 years.	Ages. Over 60 years.	No. of add. death benefits.	Ages. Not over 45 years.	Ages. Over 45 and not over 60 years.	Ages. Over 60 years.	No. of add. death benefits.	Ages. Not over 45 years.	Ages. Over 45 and not over 60 years.	Ages. Over 60 years.	No. of add. death benefits.	Ages. Not over 45 years.	Ages. Over 45 and not over 60 years	Ages. Over 60 years.
$300	0	$ .75	$ .75	$ .75	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
600	1	1.05	1.20	1.35	0	$1.50	$1.50	$1.50	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
900	2	1.35	.....	.....	1	1.80	1.95	2.10	0	$2.25	$2.25	$2.25	.....	.....	.....	.....	.....	.....	.....	.....
1,200	3	1.65	.....	.....	2	2.10	2.40	2.70	1	2.55	2.70	2.85	0	$3.00	$3.00	$3.00	.....	.....	.....	.....
1,500	.....	.....	.....	.....	3	2.40	.....	.....	2	2.85	3.15	3.45	1	3.30	3.45	3.60	0	$3.75	$3.75	$3.75
1,800	.....	.....	.....	.....	4	2.70	.....	.....	3	3.15	3.60	4.05	2	3.60	3.90	4.20	1	4.05	4.20	4.35
2,100	.....	.....	.....	.....	5	3.00	.....	.....	4	3.45	.....	.....	3	3.90	4.35	4.80	2	4.35	4.65	4.95
2,400	.....	.....	.....	.....	6	3.30	.....	.....	5	3.75	.....	.....	4	4.20	4.80	5.40	3	4.65	5.10	5.55
2,700	.....	.....	.....	.....	.....	.....	.....	.....	6	4.05	.....	.....	5	4.50	.....	.....	4	4.95	5.55	6.15
3,000	.....	.....	.....	.....	.....	.....	.....	.....	7	4.35	.....	.....	6	4.80	.....	.....	5	5.25	6.00	6.75
3,300	.....	.....	.....	.....	.....	.....	.....	.....	8	4.65	.....	.....	7	5.10	.....	.....	6	5.55	.....	.....
3,600	.....	.....	.....	.....	.....	.....	.....	.....	9	4.95	.....	.....	8	5.40	.....	.....	7	5.85	.....	.....
3,900	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	9	5.70	.....	.....	8	6.15	.....	.....
4,200	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	10	6.00	.....	.....	9	6.45	.....	.....
4,500	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	11	6.30	.....	.....	10	6.75	.....	.....
4,800	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	12	6.60	.....	.....	11	7.05	.....	.....
5,100	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	12	7.35	.....	.....
5,400	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	13	7.65	.....	.....
5,700	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	14	7.95	.....	.....
6,000	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	15	8.25	.....	.....

THIS PAGE IS BOUND VERTICAL IN BOOK

554 "DEFENDANT'S EXHIBIT 11."

Defendant's Exhibit 11.

Def't- Ex. 11.

Revised Regulations of the Relief Department of the Chicago, Burlington & Quincy Railroad Co.

Issue of June 15, 1907.

Part 2. Form 6003.

C., B. & Q. R. R. Co.—Relief Department. 6003.

Notice of Application for Membership.

Place and Date.....191–.

Name..... Occupation.....

Division..... Residence or address).....

Age.....Years.....Months. Wages per Mo.....Application for Membership in Class.....A. D. B.....Ex. Acc. D. B.....

Signature and Title of Person issuing.....

Send this Part Direct to the Medical Examiner.

Part 1. Form 6003.

C., B. & Q. R. R. Co.—Relief Department. 6003.

Notice of Application for Membership.

Place and Date.....191–.

Name..... Occupation.....

Division..... Residence or address).....

Age.....Years.....Months. Wages per Mo.....Application for Membership in Class.....A. D. B.....Ex. Acc. D. B.....

I hereby give notice of application, in accordance with the foregoing, for membership in the Relief Fund of the Relief Department

of the Chicago, Burlington & Quincy Railroad Company, to take effect immediately. I agree to be bound by the Regulations of the Relief Department of said Company, and especially by Regulation 49.

I fully understand that this Notice of Application will only entitle me to benefits on account of accident, in accordance with Regulation 49, and will not entitle me to benefits on account of disability or death caused by sickness or disease.

I hereby acknowledge receipt of a copy of the revised edition of the regulations of said department, issue of June 15, 1907.

Witness .....Signature of Applicant }.....

Send this part to Division Sup't or Master Mechanic, who will note on back the date received by him and forward to Sup't of Relief Department.

Part 2 sent to Medical Examiner, at.....

Form 6001.

Revised Regulations of the Relief Department of the Chicago, Burlington & Quincy Railroad Company.

Issue of June 15, 1907.

Revised Regulations of the Relief Department of the Chicago, Burlington & Quincy Railroad Co.

Issue of June 15, 1907.

General.

1. The "Relief Department" is a department of the Company's service in the executive charge of a Superintendent, whose directions in carrying out its regulations are to be complied with, subject to the control of the President, except in such matters as are under the control of the Advisory Committee.

Wherever in these regulations the following words occur without qualification, they will have the meaning herein defined:

"Company" will mean the Chicago, Burlington & Quincy Railroad Company; "President," "Board of Directors," and "Relief Department" — "Department," will mean the President, Board of Directors and Relief Department, respectively, of said Company; "Relief Fund," "Advisory Committee" or "Committee," "Superintendent," "Medical Director" and "Medical Examiner" will mean the Relief Fund, Advisory Committee, Superintendent, Medical Director and Medical Examiner, respectively, of said Relief Department.

2. The object of the Department is the establishment and management of a fund, to be known as the "Relief Fund," for the payment

of definite amounts to employes contributing thereto, who are to be known as "members of the Relief Fund," when under the Regulations they are entitled to such payment by reason of disability, or, in the event of their death, to the relatives or other beneficiaries designated by them with the approval of the Superintendent.

3. The Relief Fund will consist of voluntary contributions from members thereof, income derived from investments and from interest paid by the Company, and money advanced by the Company when necessary to pay benefits as they become due.

4. The Company shall have general charge of the Department, guarantee the fulfillment of its obligations as determined by these Regulations, take charge of all moneys and securities belonging to the Relief Fund and be responsible for their safekeeping, pay into the fund interest at the rate of four per cent per annum on monthly balances in its hands, supply the necessary facilities for conducting the business of the Department, and pay all the operating expenses thereof.

5. There shall be an Advisory Committee, constituted as follows:

The General Manager of the Chicago, Burlington & Quincy Railroad shall be ex-officio a member and Chairman of the Committee.

The other members of the Committee shall be chosen annually, in November or December, to serve for one year from the 1st day of January next succeeding, or until their successors are chosen, as follows:

One-half shall be chosen by the Board of Directors, and one-half by the employes, members of the Relief Fund, from among themselves by Electoral Divisions, each Electoral Division choosing one representative. The number of Electoral Divisions and extent of each shall be from time to time determined by the President.

6. The members of the Committee chosen by the members of the Relief Fund shall be elected by ballot, the vote being taken and certified under oath by tellers selected by the Committee.

In balloting for members of the Committee each member of the Relief Fund shall be entitled to cast one vote.

For the Committee to serve during the first fiscal year, or during the remainder of any fiscal year after the termination of any agreement for associated administration as hereinafter provided, the members to represent the contributing employes shall be designated by the President.

In the event of the termination of service of any member of the Committee or of his withdrawal from membership in the Relief Fund, his membership on the Committee shall thereupon terminate.

Any vacancy among the members elected by the contributing employes shall be filled by the succession to the position of the employe on the same Electoral Division who received the next highest number of votes to the retiring member.

Any vacancy among the members chosen by the Board of Directors shall be filled by appointment by the President.

Such members, and the members to be chosen by the Board of Directors for the original Committee, shall serve until their successors are chosen as above provided.

The Superintendent shall be Secretary of the Committee.

7. Should any other corporation or corporations, associated in interest with this Company, adopt or have adopted Regulations establishing a Relief Department or Relief Departments, similar to the one hereby established, this Company may associate itself with such corporation or corporations in the administration of its and their Relief Departments, when so authorized by the respective Boards of Directors of this and said corporation or corporations.

Such association shall be evidenced by agreement or agreements duly executed, authorizing, among other things, the constitution of a joint Advisory Committee, to be chosen, as and in the manner therein prescribed, by the several parties thereto and their employes, either by separate action in behalf of each of said parties, or by the united action of two or more of them as to any member or members of said Advisory Committee; the original Advisory Committee to be constituted and vacancies occurring thereafter to be filled in such manner as shall be prescribed in said agreement or agreements.

In the event of any association as aforesaid, the functions and powers herein given to and vested in the Advisory Committee created as hereinbefore provided, shall, during the continuance of said agreement or agreements, be transferred to and vested in the Advisory Committee constituted as prescribed in said agreement or agreements, chosen or designated as therein directed, and so much of the Regulations of the Relief Department herein provided for as relates to the constitution of an Advisory Committee consisting solely of officers and employes of this Company shall be suspended, with the understanding, however, that upon the termination of such agreement or agreements the Advisory Committee herein provided for, constituted as herein prescribed, shall reassume the functions and duties herein committed to it.

8. The Committee shall have general supervision of the operations of the Department and see that they are conducted in accordance with the Regulations.

The Committee shall hold stated meetings once in three months, at such time and place as they shall determine, and shall meet at other times at the call of the Chairman.

It shall be the duty of the Chairman to call special meetings of the Committee upon the written request of three of its members.

9. The Superintendent shall have charge of all business pertaining to the Department. He shall employ such clerks and other assistants as may be necessary, prescribe the forms and blanks to be used, certify all bills and pay-rolls of the Department, furnish to the Committee such reports as they may require, decide all questions properly referred to him, and exercise such other authority as may be conferred upon him by the President or the Committee.

10. There shall be an Assistant Superintendent, who shall be possessed of all the powers of the Superintendent in his absence, and shall at all times perform such duties as may be assigned to him by the Superintendent.

11. There shall be a Medical Director, who shall, subject to the approval and control of the Superintendent, appoint Medical Exam-

iners, assign them to districts, direct their work and have general supervision of the medical and surgical affairs of the Department. The Medical Director may be the same person as the Superintendent or Assistant Superintendent.

The Superintendent, Assistant Superintendent and Medical Director shall be designated by the President.

12. The Medical Examiners shall make the required physical examination of applicants for membership in the Relief Fund, prepare applications, report the condition of sick or injured members, decide when members are disabled, and when they are able to work, certify bills for surgical treatment, perform such other duties as may be required of them by the Medical Director, and conform to such rules as he may establish.

13. Wherever used in these Regulations the words "Medical Officers" shall be held to mean the Medical Examiner in charge of any case, and the Medical Director.

14. The moneys received for the Relief Fund shall be held by the Company in trust for the Department. The Committee, with the approval of the Board of Directors, may invest money not required for current use. The securities for such investments shall be in the name of the Company "in trust for the Relief Department." To maintain a reasonable cash balance in the Fund, the Company may sell or secure a loan upon such securities; but if there are no securities upon which money may be realized or no money in the Relief Fund, the Company shall temporarily advance, without charge to the Fund, such money as is necessary to meet the obligations of the Department as they become due.

15. The fiscal year of the Department shall begin with the 1st day of January of each year.

The condition of the Relief Fund at the close of each fiscal year shall be audited and reported on by competent person or persons selected for that purpose by the members of the Committee who represent the members of the Relief Fund.

16. Amendments to the Regulations of the Department may be proposed to the Committee, at any meeting, by any member of the Committee. Amendments so proposed may be acted upon only at a subsequent meeting; but no amendment shall be operative unless adopted by vote in the affirmative of a majority of the whole Committee, approved by the Board of Directors, and duly announced by the Superintendent; and any amendment so adopted, approved and announced shall be binding upon the Company and the members of the Relief Fund and all persons claiming through them from the date specified in the announcement of the same.

Membership.

17. All employes of the Company who, under the Regulations, are contributors to the Relief Fund, shall be designated as "members of the Relief Fund."

18. In referring to employes of the Company, the word "service" shall mean employment by this Company, or by any Company asso-

ciated with it in the administration of their Relief Departments; and the service of any employe shall be regarded as continuous for the time during which he has been continuously in the employ of this Company and any one or more of such associated Companies.

19. There shall be five classes of members. The highest class in which an employe may be a member, shall be determined by his regular or usual monthly pay, as follows:

Monthly pay.	Highest class.
Less than $35	1st.
$35.00 or more, but less than $55.00	2d.
55.00 " " " " 75.00	3d.
75.00 " " " " 95.00	4th.
95.00 "	5th.

For employes paid by the hour, trip, piece, or in any other way than by the month, the highest class shall be determined by the usual amount of earnings in a month.

For persons in the service of this Company, and of one or more of the Companies associated with it in the administration of their Relief Departments, the highest class shall be determined by the total pay received from all such Companies, and the membership shall be in the Relief Fund of this Company, if the largest amount is received therefrom.

20. No employe shall be required to become a member of the Relief Fund.

21. Any employe not over forty-five years of age may, upon passing a satisfactory medical examination, and upon approval of his application by the Superintendent, become a member in the highest class allowed by his pay, or in any lower class, with or without additional death benefits of the first class not greater in the aggregate than three times the death benefit of the class he enters.

Any person over forty-five years of age who becomes an employe of this Company in consequence of the purchase or lease of the property of any other Company may, at any time within two months of the date of his employment by this Company, upon passing a satisfactory medical examination and upon approval of his application by the Superintendent, become a member in the highest class allowed by his pay, or in any lower class, with or without additional death benefits of the first class not greater in the aggregate than the death benefit of the class he enters.

22. Any member not over forty-five years of age may, upon passing a satisfactory medical examination, and upon approval of his application by the Superintendent, change to any higher class allowed by his pay or take additional death benefits of the first class to such extent that the aggregate of additional death benefits shall not exceed three times the death benefit of the class in which he is or becomes a member.

Any member or applicant for membership may, upon approval of his application by the Superintendent, take extra accident death benefits of the first class to such extent that the aggregate of extra acci-

dent death benefits shall not exceed twice the death benefit of the class in which he is or becomes a member; provided, however, that title to such extra accident death benefit shall cease upon termination of service or when title to disability benefits has expired.

Any member who has been debarred from taking a higher class when his pay was increased, by reason of his being over forty-five years of age, or any member whose pay is increased enough after he is forty-five years of age to entitle him to membership in a higher class may, upon passing a satisfactory medical examination and upon approval of his application by the Superintendent, change to any higher class allowed by his pay; provided, however, that application for such change be made within three months of the time this regulation becomes effective or of such increase of pay.

23. Any member may, upon executing the proper form of application, change to a lower class or relinquish all or a part of his additional or extra accident death benefits.

24. When a member voluntarily changes to a lower class, the amount of the death benefit he retains shall not exceed the maximum of that class.

25. An employe can not remain a member in a class higher than that allowed by his pay, but when the pay of a member is reduced he shall not be required to make any change in the amount of his death benefit other than extra accident death benefit; and any excess of death benefit above that to which he is entitled by his new class shall be treated as additional death benefit.

If a member declines to effect a proper reduction of class under the foregoing, the Superintendent shall have authority to cancel his membership.

26. When a member of the Relief Fund of any one of the Companies associated with this Company in the administration of their Relief Departments is transferred to the service of this Company, his membership shall thereby be transferred to the Relief Fund of this Company.

27. Any member may withdraw from the Relief Fund at the end of any month upon giving notice before the 25th of that month on the prescribed form of withdrawal notice, which will be furnished by his timekeeper upon request.

28. Any member who is furloughed, suspended or otherwise temporarily relieved from the service for a period not exceeding sixty days, may retain his membership during such absence by paying his contributions in advance. If absence is for a longer period, membership may only be retained in respect of death benefit, unless the member previously arranged otherwise with the Superintendent. His Division Officer or Head of Department shall notify the Superintendent at the beginning of such absence, specifying the time set for return to duty, and if at that time the member does not return to duty his membership in the Relief Fund shall thereupon terminate, unless otherwise previously arranged by him with the Superintendent.

29. When a member resigns from the service, or leaves the service without notice, or is relieved or discharged therefrom, his member-

ship in the Relief Fund shall terminate with his employment, and he shall not be entitled to any benefits for time thereafter, except such as he may be entitled to by reason of disability beginning and reported before, and continuing without interruption to and after such termination of employment; provided, however, that any member who has been continuously in the service three years, and a member of the Relief Fund one year immediately preceding termination of his employment, may continue his membership thereafter, but only in respect of the minimum death benefit which he has held at any time during the last year, or of any smaller amount, upon making supplementary application therefor on the prescribed form before termination of employment, or within five days thereafter.

When a member contributing for death benefit only after termination of service is again reemployed he shall thereupon resume full membership if physically qualified.

A person entitled to benefits for time after termination of service shall not be entitled to benefits on account of sickness beginning or injury occurring during such time; nor on account of death occurring in such time, unless directly due to the sickness or injury and occurring during the disability existing at the time of such termination of service, or unless he continues his membership in respect of death benefit only in accordance with the foregoing.

30. When a member absents himself from duty for a period of six days without the permission of his employing officer previously obtained, or without giving, meanwhile, reason for absence, satisfactory to his employing officer, he shall be held to have left the service without notice, and his membership shall be held to have terminated on the day preceding such absence. If such member be reinstated in the service he may also be reinstated in membership upon approval of the Superintendent.

31. If a member is relieved from service and is afterward reemployed, he may again become a member of the Relief Fund, although then over forty-five years of age, upon application within sixty days of the time of reemployment, upon passing a satisfactory medical examination in which his physical condition at the termination of former employment will be given due consideration, and upon approval of his application by the Superintendent.

Applications.

32. Membership in the Relief Fund shall be based upon an application in the following form:

Application for Membership in the Relief Fund of the Relief Department of the Chicago, Burlington & Quincy Railroad Company.

To the Superintendent of the Relief Department of the Chicago, Burlington & Quincy Railroad Company:

I, —— ——, of ——, in the county of —— and State of ——, now employed by the Chicago, Burlington & Quincy Railroad Com-

pany, do hereby apply for membership in the Relief Fund of the Relief Department of said Company, and consent and agree to be bound by the Regulations of said Relief Department, which Regulations I have read or have had read to me, and by any other regulations of said Department hereafter adopted and in force during my membership, and by any agreement now or hereafter made by the said Company with any other corporation or corporations now or hereafter associated with it in the administration of their Relief Departments.

I also agree, That the said Company, by its proper agents, and in the manner provided in said Regulations, shall apply, as a voluntary contribution from any wages earned by me under said employment, the sum of — ($— /100) per month, for the purpose of securing the benefits provided in the Regulations for a member of the Relief Fund of the — class, with — additional death benefit of the first class, and — extra accident death benefit of the first class.

Unless I shall hereafter otherwise designate, in writing, with the approval of the Superintendent of the Relief Department, death benefit shall be payable to my wife (husband), if I am married at the time of my death; or, if I have no wife (husband) living, then to my children collectively, each to be entitled to an equal share, including, as entitled to the parent's share, the issue of any deceased child; or, if there be no children or such issue living, then to —— —— if living; and if not living, then to my father and mother jointly, or the survivor; or, if neither be living, then to my next of kin, payment in behalf of such next of kin to be made to my legal representatives; or, if there be no such next of kin, the death benefit shall lapse, and the amount thereof shall remain as a part of the Relief Fund, without claim for the same.

Any funeral or other expenses incident to my death, which shall have been paid by the Superintendent of the Relief Department, in accordance with the Regulations, shall be held to be in part payment of the said death benefit, and shall be deducted from the total amount thereof before payment to the person or persons entitled to receive the same.

I also agree, That, in consideration of the amounts paid and to be paid by said Company for the maintenance of said Relief Department, and of the guarantee by said Company of the payment of said benefits, the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims against said Company, and all other Companies associated therewith in the administration of their Relief Departments, for damages arising from or growing out of said injury; and further, in the event of my death no part of said death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the Superintendent of said Relief Department, of all claims against said Relief Department, as well as against said Company and all other Companies associated therewith as aforesaid, arising from or growing out of my death, said releases having been duly executed by all who might legally assert such claims; and further, if any

suit shall be brought against said Company, or any other Company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to me, the benefits otherwise payable, and all obligations of said Relief Department, and of said Company created by my membership in said Relief Fund, shall thereupon be forfeited without any declaration or other act by said Relief Department or said Company.

I also agree, That this application, upon approval by the Superintendent of the Relief Department, shall make me a member of the Relief Fund, on and from the date specified in such approval, and constitute a contract between myself and the said Company, and that the same shall not be avoided by any change in the character of my service, or locality where rendered, while in the employment of said Company, nor by any change in the amounts applicable from my wages to the Relief Fund, which I may hereafter consent to, and that the agreement that the above-named amounts shall be appropriated from my wages shall apply also to any other amounts which I may agree to pay under the provisions of said Regulations, by reason of changes made as aforesaid, and shall constitute an appropriation and assignment in advance of such portions of my wages to the said Company in trust, for the Relief Fund, for the purpose of maintaining my membership therein, which assignment shall have precedence over any other assignment by me of my wages, or of any claim upon them on account of liabilities incurred by me.

I also agree, That my being transferred to the service of any other Company associated with said Company in the joint operation of their Relief Departments shall operate to transfer my membership in the Relief Fund of said Company to the Relief Fund of the Company to the service of which I am transferred and that this application and contract shall thereupon become binding between me and such other Company, the same as if originally made by me with such other Company.

I also agree, For myself and those claiming through me, to be especially bound by the Regulation providing for final and conclusive settlement of all claims for benefits or controversies of whatsoever nature by reference to the Superintendent of the Relief Department, and an appeal from his decision to the Advisory Committee.

I certify, That I am correct and temperate in my habits; that, so far as I am aware, I am now in good health, and have no injury or disease, constitutional or otherwise, except as shown on the accompanying statement made by me to the Medical Examiner, which statement shall constitute a part of this application.

I also agree, That any untrue or fraudulent statement made by me to the Medical Examiner, or any concealment of facts in this application, or any attempt on my part to defraud or impose upon said Relief Fund, or my resigning from, or leaving the service of the said Company, or my being relieved or discharged therefrom, shall forfeit my membership in the said Relief Fund, and all benefits, rights or equities arising therefrom, except that such termination of my employment shall not (in the absence of any of the

other foregoing causes of forfeiture) deprive me of any benefits to the payment of which I may be entitled by reason of disability beginning and reported before and continuing without interruption to and after such termination of my employment, nor of the right to continue my membership in respect of death benefit only, as provided in said Regulations.

In Witness Whereof, I have signed these presents at —— in the county of ——, State of ——, this — day of —— A. D. 19—, this application to take effect immediately, or on such subsequent date as may be designated by said Superintendent.

The following changes made before execution:

—— ——.

Witness —— ——.

The foregoing application is approved at the office of the Superintendent of the Relief Department at Chicago, in the county of Cook, State of Illinois, this — day of ——, A. D. 19—, to take effect the — day of ——, A. D. 19—.

—— ——,

Superintendent of the Relief Department.

The last application in the foregoing form, or in a corresponding earlier form, which shall have been made by an employe, shall be known as his "Principal Application."

Upon the approval of the principal application of an employe by the Superintendent, he shall be a member on and from the date specified in such approval, and the Superintendent shall issue to him a certificate of membership.

33. The following form of supplementary application shall be used by members applying to enter higher or lower classes, or for additional or extra accident death benefit or reduction therein:

Supplementary Application.

To the Superintendent of the Relief Department of the Chicago, Burlington & Quincy Railroad Company:

I, —— ——, of ——, in the county of —— and State of ——, now employed by the Chicago, Burlington & Quincy Railroad Company, and a member of the Relief Fund of the Relief Department thereof, by virtue of my former principal application, under and subject to the conditions recited in said principal application and upon the terms thereof, unless, and only so far as, herein modified, do hereby make this supplementary application for the following, namely: to change my membership in said Relief Fund from — class with — additional death benefits of the first class and — extra accident death benefits of the first class, to — class with — additional death benefits of the first class and — extra accident death benefits of the first class; my contribution after such change is made to be at the rate of — ($— /100) per month; this application to take effect immediately, or on such subsequent date as may be designated by said Superintendent.

(*a*). I certify, That I am correct and temperate in my habits; that, so far as I am aware, I am now in good health, and have no injury or disease, constitutional or otherwise, except as shown in the accompanying statement made by me to the Medical Examiner, which statement shall constitute a part of this application.

I hereby agree, That any untrue or fraudulent statement made by me to the Medical Examiner, or any concealment of facts in this application, shall make this supplementary application void and of no effect.

In Witness Whereof, I have signed these presents at —— in the county of ——, State of ——, this — day of —— A. D. 19—.

The following changes made before execution:

—— ——.

Witness:

—— ——.

The foregoing supplementary application is approved at the office of the Superintendent of the Relief Department at Chicago, in the county of Cook, State of Illinois, this — day of —— A. D. 19—, to take effect the — day of —— A. D. 19—.

—— ——,

Superintendent of the Relief Department.

NOTE.—(*a*). For employes who are not required to pass a medical examination upon making a supplementary application, the underlined words will be omitted.

If any applicant for membership or for change in membership has physical defects which would preclude the approval of his application, if presented unconditionally, his application may nevertheless be approved, provided that he executes an agreement in writing, satisfactory to the Superintendent, to the effect that he shall not be entitled under his membership to any benefits for disability caused by, arising from or growing out of such defects, such agreement to be attached to and to be a part of his said application, and such modification of the prescribed forms of application is hereby authorized.

34. The application of a married woman must be signed also by her husband, and that of a minor by the father or legal guardian, unless otherwise directed by the Superintendent.

Contributions.

35. The word "contribution" wherever used in these Regulations shall be held and construed to refer to such designated portion of the wages payable by the Company to an employe, as he shall have agreed, in his application, that the Company shall apply for the purpose of securing the benefits of the Relief Fund; or to such cash payment as it may be necessary for a member to make for said purpose.

36. Contribution for full membership shall be made monthly in

advance, at the following rates: First class, 75 cents per month; second class, $1.50; third class, $2.25; fourth class, $3.00; fifth class, $3.75.

The monthly rate of contribution for each extra accident death benefit of the first class shall be 15 cents.

The monthly rates of contribution for each additional death benefit of the first class shall be determined by the age of the member at the time of taking the additional death benefit and shall be as follows: For a member not over 45 years of age, 30 cents; over 45 and not over 60 years of age, 45 cents; over 60 years of age, 60 cents.

Contribution for death benefit only shall be made quarterly in advance and shall be based on the age of the member at the time of taking such death benefit; and the rate for each death benefit of the first class, contained in the death benefit of his class, shall be the same as herein fixed for each additional death benefit of the first class.

37. Contribution for any month will be due on the first day of that month, and will ordinarily be deducted from the member's wages on the pay-roll of the preceding month.

If a member's contribution is omitted from the pay-roll in error, the fact that such deduction has not been made shall not debar him or his beneficiary from benefits to which they otherwise would be entitled.

When a member has no wages on the pay-roll, any contribution due from him must be paid in cash in advance, otherwise he will be in arrears. A member in the service shall make such cash payment to the Superintendent through his superior officer; a member contributing for death benefit only shall make such cash payment to the Superintendent direct.

38. Benefits shall not be due on account of disability beginning or death occurring while a member is in arrears.

When a member is in arrears for two months his membership shall thereupon cease.

If a member resumes work for the Company before he has been in arrears two months he shall be protected from the time of resuming work, and the arrears may be paid on the next pay-roll.

39. No deduction on account of contribution to the Relief Fund shall be made from the pay of an applicant for membership, and no increase of deductions shall be made from the pay of an applicant for increase of class or additional death benefit without instructions from the Superintendent, and any deduction made to the contrary shall be held to have been made in error, and shall be refunded, if the application is not approved.

40. When a member recovers from disability, his contribution for the remainder of the month in which he recovers, if not already paid, together with his contribution for the following month, shall be deducted on the pay-roll of the month in which he recovers.

41. In determining contribution for part of a month, the amount for each day shall be one-thirtieth of the amount for one month, and the amount for any other part of a month shall be determined by multiplying the amount for one day by the number of days in such part, adding to make even cents when fractions occur.

42. In determining the number of days in the part of a month for which contribution is to be collected, the day on which an application takes effect and the day after the recovery of a member from disability shall be included.

43. A member shall not make contribution for any time of disability beyond the end of the month in which disability begins, except as specifically provided in the Regulations. While wages are paid during disability the usual contribution shall be made.

If a disabled member declines to accept benefits, he shall contribute for, and be entitled to, death benefit only, while disabled. If such member afterwards accepts the benefits to which he is entitled a proper adjustment of contribution shall be made.

44. When a member's service terminates there shall be due him as refund any excess of contribution he may have made above what is necessary to adjust his account up to, but not including, the last day of service.

Any refund of contribution due at the termination of a member's service shall be payable upon application therefor by the member, and shall be made by time check or otherwise, in conformity with the financial methods of the Company.

Disability.

45. Wherever used in these Regulations the word "disability" shall be held to mean physical inability to work, by reason of sickness or accidental injury, and the word "disabled" shall apply to members thus physically unable to work. The decision as to when members are disabled and when they are able to work, shall rest with the medical officers of the Department.

The decision as to whether disability at any time shall be classed as due to sickness or due to accident, and as to whether any disability shall be considered a relapse or an original disability, shall rest with the medical officers of the Department.

When a disability is classed as a relapse the time of such disability shall be considered a part of the original disability in determining the length of time for which benefits may be drawn and the rate at which benefits are payable.

In considering the question of disability, subjective symptoms or alleged feelings will be given due weight, but these in themselves, unsupported by objective and discoverable symptoms, shall not entitle a member to be considered disabled.

Benefits.

The following benefits will be paid to members or beneficiaries entitled thereto in accordance with the provisions of these Regulations:

Accident Benefits.

46. Payment for each day of disability classed as due to accident for a period not longer than fifty-two (52) weeks, as follows: To a member of the first class, 50 cents; second class, $1; third class, $1.50; fourth class, $2; fifth class, $2.50; and at half these rates

thereafter during the continuance of disability. Also, payment to or in behalf of the member for such an amount for necessary surgical treatment as may be approved by the Medical Director. No member shall have authority to contract any bills against the Department, and nothing herein shall be held to mean or imply that the Department shall be responsible for the payment of such bills as a member may contract or his surgeon may charge. Bills for surgical attendance, to be considered by the Department, must be made out against the member and must be itemized.

To establish a claim for accident benefits the accident must be reported immediately upon its occurrence and there must be external positive and visible evidence of physical injury by accident sufficient to cause immediate disability. In cases of alleged sprain, strain, wrench and the like, where physical proof of disabling injury is lacking, the member must furnish substantiated history, satisfactory to the Superintendent, of violence accidentally inflicted sufficient and liable to cause disabling injury, otherwise accident benefits will not be allowed.

When a member meets with any accident from which disability may result and on account of which he wishes to reserve the right to claim accident benefits, he shall report the accident to his employing officer immediately upon its occurrence and also report in person to the Medical Examiner the same as is provided in these Regulations in case of actual disability.

If a member receives accidental injuries producing the immediate severing of, or necessitating, in the opinion of the medical officers of the Department, the amputation of, a hand or a foot at or above the wrist or ankle, he may either receive daily benefits and payment of surgical bills, as above provided, also an artificial limb when such can be worn, or, in lieu thereof and in full of all claims or demands of whatsoever nature against the Department and the Company, and upon executing a release to this effect satisfactory to the Superintendent, he may receive the following: For a member in the first class, $800; second class, $1,400; third class, $2,000; fourth class, $2,600; fifth class, $3,200; and twice these amounts in case of loss of both hands or both feet or of one hand and one foot. Any such member who has been in receipt of daily benefits on account of such injury, and who has not yet been reported able to work by the Medical Examiner, may receive in full settlement the above fixed amounts, less the amount already paid to and for him on account of such injury, upon execution of a release as above provided.

Sick Benefits.

47. Payment for each day, except for the first six days, of disability classed as due to sickness, for a period not longer than fifty-two (52) weeks, at the same rates as for accident benefits, and at half such rates for an additional period of fifty-two (52) weeks.

In cases of members who have received sick benefits prior to March 1, 1904, the time for which they may become entitled to further sick benefits after said date shall be computed as follows: Each day of sickness in excess of fifty-two (52) weeks for which benefits have

been so paid shall be counted as two days, and the number so found shall be deducted from 364, and the remainder shall be the number of days for which the member may become entitled to further sick benefits under these regulations.

When a member shall have received benefits for fifty-two (52) weeks at full rates and benefits for fifty-two (52) weeks at half rates in the aggregate of all disabilities by sickness from the Relief Fund of this Company and of all other Companies now or heretofore associated therewith in the administration of their Relief Departments, he shall not be entitled to further disability benefits.

To establish a claim for sick benefits there must be positive evidence of acute or constitutional disease sufficient to cause disability.

Disability resulting from infection of a cut, abrasion, scratch, puncture or other wound, or from any injury, not immediately disabling and not reported at the time of the occurrence of the accident causing the injury, or from poison however taken into or acting upon the body, or from any overdose of medicine or drug taken by mistake, or from surgical operation necessary for the removal of some defect, which would otherwise probably produce disability, or from sunstroke or frostbite, shall be classed as due to sickness.

Death Benefits.

48. Payment, in accordance with the conditions prescribed in the Regulations, upon the death of a member, as follows: To the beneficiary of a member of the first class, $300; second class, $600; third class, $900; fourth class, $1,200; fifth class, $1,500. Also, payment of $300 for each additional death benefit of the first class and payment of $300 for each extra accident death benefit of the first class to which the beneficiary is entitled.

To establish a claim for extra accident death benefit, the death must be shown to have occurred solely by reason of, and within thirty days after, the receipt of an accidental injury; and there must be external, positive and visible evidence of physical injury by accident sufficient to cause death.

49. If an employe, entitled to become a member upon passing a satisfactory medical examination, and who has not previously been examined and rejected, shall have executed a prescribed form of "Notice of Application," but shall not have had opportunity to be examined before the date specified thereon for his application to take effect, he shall be protected by such notice of application, under and in accordance with the terms of the prescribed form of principal application from said date until he shall have had opportunity to be examined; provided, however, that he shall only be entitled to benefits payable on account of injury or death caused solely by accident happening in such interval, and if his principal application is not approved, his rights and obligations in the Relief Fund shall cease from the time of medical examination; and if he shall refuse or neglect to be examined when opportunity for examination is offered, his rights and obligations in the Relief Fund shall thereupon cease.

An applicant, protected in accordance with the foregoing against

accident only, shall contribute at half rate while so protected. The principle of the foregoing shall also apply in case of notice of application for higher class or additional death benefit.

50. A member shall not be entitled to receive benefits continuously for more than fifty-two (52) weeks at full rates for any disability caused by accident or sickness or by a succession or combination of accident and sickness. In case of disability from accident alone and in case of succession of accident disability upon sickness disability, benefits shall be payable at half rates after said fifty-two (52) weeks. In case of succession of sickness disability upon accident disability, benefits payable at half rates shall not exceed an additional fifty-two (52) weeks.

A member not entitled to further sickness benefits under this regulation shall contribute for, and be entitled to, death benefit only until reported able to work by the Medical Examiner, otherwise his membership shall cease.

A member shall not be entitled to benefits for disability from any cause while still disabled from a preceding cause.

In case of relapse, in sickness disability, occurring within two weeks, or of succession of sickness disability upon an accident disability which lasted six days or more, the first sax days shall not be deducted in computing time of sick benefits; and where such immediately preceding accident disability lasted five days or less, the number of days to be deducted shall be six, less the number of days of such accident disability.

51. A member who has received sick benefits to the full extent contemplated by these Regulations may retain his membership in respect of death benefit only by contributing for the same, such contribution to begin at the expiration of his right to sick benefits, otherwise his membership shall cease.

52. In any case of grave injury or chronic sickness where the member desires to accept a lump sum in lieu of the benefits which might become due to him or on his account, and in full of all obligations of the Department or Company arising from his membership or service, the Superintendent shall have authority to make full and final settlement with such member on such terms as may be agreed upon in writing. All such settlements shall be reported to the Committee at their next meeting.

53. Benefits on account of continued disability will be paid monthly. Benefits for short periods of disability will be paid as soon as the amounts due can be ascertained.

Benefits payable on account of the disability of a member shall be payable only to such member, or in accordance with his written order when approved by the Superintendent, or to his legal representative; but payment for surgical treatment may be made to the attending surgeon.

When in the opinion of the Superintendent a member is mentally incompetent, disability benefits due to him may, at the discretion of the Superintendent, be paid to his wife or to some member of his family or to his employing officer, for the use and benefit of the mem-

ber, and such payment shall be a bar to any subsequent claim on the part of the member or his legal representative for amounts so paid.

54. Death benefits, together with any unpaid disability benefits, shall be payable to the beneficiary of a deceased member upon proof of claim and execution and delivery of the necessary releases in conformity with these Regulations.

A part of the death benefit, not to exceed two hundred dollars ($200), may, at the discretion of the Superintendent, be paid before final settlement, to meet funeral or other urgent expenses incident to the death of a member.

Miscellaneous.

55. When a member becomes disabled he shall notify his timekeeper immediately, or cause him to be so notified. In reporting disability the member shall also give his house address. If he fails to give notice until he recovers he shall not be entitled to benefits unless he proves his disability to the satisfaction of the Superintendent, and gives satisfactory reason for failure to give notice. If he gives notice during his disability, but delays in so doing, he shall not be considered disabled before the day on which notice is given, unless he proves his disability before that day to the satisfaction of the Superintendent, and gives satisfactory reason for delay in giving notice.

When a member becomes disabled it shall also be his duty, unless incapacitated therefrom by his disability, to report immediately in person to the Medical Examiner at his office during office hours, if a member resides or becomes disabled in or goes to a town where there is a Medical Examiner; it shall also be the duty of a disabled member not confined to the house by disability, to report at the Medical Examiner's office from time to time, as requested, and to keep any other appointments made by the Examiner. Members who avoid the Medical Examiner, or neglect to report or keep appointments as herein provided, shall not be entitled to benefits.

If a member, who has been reported by the Medical Examiner as able to work, is not able to work on the day set, he shall immediately notify his employing officer to that effect and shall immediately communicate with the Medical Examiner, and report to him in person if possible, otherwise he shall not be considered disabled on or after the day set for his return to work.

56. When a member becomes disabled during suspension, furlough or other leave of absence, and while away from his usual place of residence when on duty, he shall not be entitled to benefits, unless, in addition to reporting his disability immediately, as required by the Regulations, he proves his disability while absent to the satisfaction of the Superintendent.

57. When a disabled member wishes to absent himself for any length of time from his usual place of residence when on duty, he shall first see the Medical Examiner and obtain his written approval of absence for a specified time; he shall furnish to the Medical Examiner satisfactory certificates of disability during absence, keep

him informed of his address and report to him immediately upon his return; and if such disabled member goes away and remains away without previously consulting the Medical Examiner and obtaining his written approval of absence for a specified time, he shall not be entitled to benefits for any time of absence unless he proves his disability while absent to the satisfaction of the Superintendent, and gives satisfactory reason for failure to consult the Medical Examiner before leaving.

58. Members shall not be entitled to benefits for time during which wages are paid them by the Company. In computing benefits, the time of disability shall be considered as beginning upon the first day upon which no wages or less than one-half day's wages are paid, because of disability, and this day shall be called "first day wages not paid."

59. Benefits shall not be payable for disability directly, indirectly or partly due to intoxication or to use of alcoholic liquors as a beverage, or to immoderate use of stimulants or narcotics, or to unlawful acts or immoralities, or to venereal disease however contracted, or to the results thereof, or to urethritis, orchitis, epididymitis, stricture or glandular swelling or abscess in the groin, however caused, or to fighting, unless in self-defense against unprovoked assault, or to other encounter, such as wrestling, scuffling, fooling and the like, or to injury received in any brawl, or in any liquor saloon, gambling house or other disreputable resort.

During disability coming under this Regulation a member shall contribute for and be entitled to death benefit only.

60. Members shall not be entitled to benefits if they decline to permit the Medical Examiner to make or to have made by any other physician, such examination as he may deem necessary to ascertain their condition when disability is claimed.

Disabled members must take proper care of themselves and have suitable treatment; benefits will be discontinued if members refuse or neglect to comply with the recommendations of the medical officers of the Relief Department as to proper care and treatment.

61. Benefits shall be paid in conformity with the financial methods of the Company, and on orders drawn by the Superintendent (or such other person as may be designated by the President) upon his receiving satisfactory certificates respecting the claims and such releases as may be required by him.

62. Any claim for disability benefits, to be valid, must be made within sixty days from the time when such benefits accrued, and any claim for death benefit, to be valid, must be made within two years from the death of the member.

63. Members shall keep their foremen or timekeepers informed of their addresses.

A member's place of residence when on duty shall be held to be at the last address given to his timekeeper.

Members who have left the service, but retain their membership in respect of death benefit only, shall keep the Superintendent informed of their addresses by notice in writing, and the Superintend-

ent shall promptly acknowledge notification of any address or change of address.

64. In case of injury to a member he may elect to accept the benefits in pursuance of these Regulations, or to prosecute such claims as he may have at law against the Company or any Company associated therewith in the administration of their Relief Departments.

The acceptance by the member of benefits for injury shall operate as a release and satisfaction of all claims against the Company and all other Companies associated therewith as aforesaid, for damages arising from or growing out of such injury; and further, in the event of the death of a member no part of the death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the Superintendent, of all claims against the Relief Department, as well as against the Company and all other Companies associated therewith as aforesaid, arising from or growing out of the death of the member, said releases having been duly executed by all who might legally assert such claims; and further, if any suit shall be brought against the Company or any other Company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to a member, the benefits otherwise payable and all obligations of the Relief Department and of the Company created by the membership of such member in the Relief Fund shall thereupon be forfeited without any declaration or other act by the Relief Department or the Company; but the Superintendent may, in his discretion, waive such forfeiture upon condition that all pending suits shall first be dismissed.

The payment by the Company, or any Company associated therewith as aforesaid, of any amount in compromise of a claim for damages arising from or growing out of an injury to, or the death of, a member, shall preclude any and all claims for benefits from the Relief Fund arising from or growing out of such injury or death.

65. In any controversy, claim, demand, suit at law or other proceeding between any member, his beneficiary or legal representative and the Company or the Relief Department, the certificate of the Superintendent as to any facts appearing in the records of the Relief Department or of the Company, or that any writing is a copy taken from said records or of any instrument on file in said Department or with the Company, or that any action has or has not been taken by the Committee or the Board of Directors of the Company, shall be prima facie evidence of the facts therein stated.

66. All questions or controversies of whatsoever character arising in any manner, or between and parties or persons in connection with the Relief Department or the operation thereof, whether as to any claim for benefits preferred by any member or his legal representative or his beneficiary or any other person, or whether as to the construction of language or meaning of the Regulations, or as to any writing, decision, instruction or acts in connection with the operation of the Department, shall be submitted within sixty days of the time of the decision from which an appeal is taken, to the determination of the Superintendent, whose decision shall be final and conclusive thereof, unless an appeal from such decision shall be taken to the

Committee within thirty days after notice of such decision to the parties interested.

When an appeal is taken to the Committee it shall be heard by said Committee without further notice at their next stated meeting, or at such future meeting or time as they may designate, and shall be determined by vote of the majority of a quorum, or of any other number not less than a quorum of the members present at such meeting, and the decision arrived at thereon by the Committee shall be final and conclusive upon all parties without exception or appeal.

Explanatory.

The following table shows the monthly pay admitting to the several classes, the rates of contributions and disability benefits, and the minimum and maximum death benefit of any class.

No one over forty-five years of age can become a member, change to a higher class, or take additional death benefit except as is provided in Regulations Nos. 21 and 22.

Age is taken at nearest birthday.

In addition to the death benefit shown in this table, members may take extra accident death benefits not greater in the aggregate than twice the death benefit of their class, without regard to age or physical condition. The monthly rate of contribution for each extra accident death benefit is 15 cents. This allows a member in the first class to carry extra accident death benefit of $600; second class, $1,200; third class, $1,800; fourth class, $2,400; fifth class, $3,000.

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Total Death Benefit.	Any amount. 1st class. Benefits 50c. per day.				$35.00 or more. 2d class. Benefits $1.00 per day.				$55.00 or more. 3d class. Benefits $1.50 per day.				$75.00 or more. 4th class. Benefits $2.00 per day.				$95.00 or more. 5th class. Benefits $2.50 per day.			
	No. of add. death benefits	Ages. Not over 45 years	Ages. Over 45 and not over 60 years.	Ages. Over 60 years.	No. of add. death benefits.	Ages. Not over 45 years.	Ages. Over 45 and not over 60 years.	Ages. Over 60 years.	No. of add. death benefits.	Ages. Not over 45 years.	Ages. Over 45 and not over 60 years.	Ages. Over 60 years.	No. of add. death benefits.	Ages. Not over 45 years.	Ages. Over 45 and not over 60 years.	Ages. Over 60 years.	No. of add. death benefits.	Ages. Not over 45 years.	Ages. Over 45 and not over 60 years.	Ages. Over 60 years.
$300	0	$ .75	$ .75	$ .75	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
600	1	1.05	1.20	1.35	0	$1.50	$1.50	$1.50	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
900	2	1.35	.....	.....	1	1.80	1.95	2.10	0	$2.25	$2.25	$2.25	.....	.....	.....	.....	.....	.....	.....	.....
1,200	3	1.65	.....	.....	2	2.10	2.40	2.70	1	2.55	2.70	2.85	0	$3.00	$3.00	$3.00	.....	.....	.....	.....
1,500	.....	.....	.....	.....	3	2.40	.....	.....	2	2.85	3.15	3.45	1	3.30	3.45	3.60	0	$3.75	$3.75	$3.75
1,800	.....	.....	.....	.....	4	2.70	.....	.....	3	3.15	3.60	4.05	2	3.60	3.90	4.20	1	4.05	4.20	4.35
2,100	.....	.....	.....	.....	5	3.00	.....	.....	4	3.45	.....	.....	3	3.90	4.35	4.80	2	4.35	4.65	4.95
2,400	.....	.....	.....	.....	6	3.30	.....	.....	5	3.75	.....	.....	4	4.20	4.80	5.40	3	4.65	5.10	5.55
2,700	.....	.....	.....	.....	.....	.....	.....	.....	6	4.05	.....	.....	5	4.50	.....	.....	4	4.95	5.55	6.15
3,000	.....	.....	.....	.....	.....	.....	.....	.....	7	4.35	.....	.....	6	4.80	.....	.....	5	5.25	6.00	6.75
3,300	.....	.....	.....	.....	.....	.....	.....	.....	8	4.65	.....	.....	7	5.10	.....	.....	6	5.55	.....	.....
3,600	.....	.....	.....	.....	.....	.....	.....	.....	9	4.95	.....	.....	8	5.40	.....	.....	7	5.85	.....	.....
3,900	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	9	5.70	.....	.....	8	6.15	.....	.....
4,200	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	10	6.00	.....	.....	9	6.45	.....	.....
4,500	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	11	6.30	.....	.....	10	6.75	.....	.....
4,800	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	12	6.60	.....	.....	11	7.05	.....	.....
5,100	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	12	7.35	.....	.....
5,400	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	13	7.65	.....	.....
5,700	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	14	7.95	.....	.....
6,000	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	15	8.25	.....	.....

555 Mr. EVERETT:

Q. Was Joseph M. Wagner, the plaintiff in this case, a member of that Relief Department?

Mr. McSHANE: Wait a minute, I object to that, your Honor. There are writings here that are the best proof of that. It is a conclusion.

Mr. EVERETT: Why it is the ultimate fact.

The COURT: If he knows, he may answer.

Mr. McSHANE: I desire to except to that. The writing here, the application and all tells its own story.

To which ruling of the Court plaintiff then and there duly excepted.

Mr. EVERETT: The Judge says you may answer, Mr. Redfern.

A. He is a member, yes.

Q. Do you know how long he has been a member?

Mr. McSHANE: Same objection, your Honor.

The COURT: Yes, same ruling, on your objection pertaining to this matter.

Mr. McSHANE: Yes, exception.

To which ruling of the Court the plaintiff by his counsel, then and there duly excepted.

A. My recollection is sometime in 1902, since sometime in 1902.

Mr. EVERETT: As a member he is subject to the rules and regulations that we have offered in evidence here marked Defendants' Exhibit- 10 and 11.

Mr. McSHANE: I object to that, that is a question of law.

The COURT: Objection sustained.

Mr. EVERETT: Exception.

To which ruling of the court the defendant by its counsel, then and there duly excepted.

556 Mr. EVERETT: I wish to show that he is subject to these rules.

Mr. McSHANE: I don't object to the fact, but the legal conclusions, I object to that.

Mr. EVERETT:

Q. I show you defendants' Exhibit 4 and ask you if that bears your signature?

A. It does.

Q. That is your approval of his application for membership, is it?

A. It is.

Q. Do you know whether or not the plaintiff in this case has made any application for the payment of benefit by reason of the injury that he has sustained?

Mr. McSHANE: I object. If it id in writing, the writing is the best proof.

Mr. EVERETT: There is no writing.

The COURT: Well, if the rules of the company provide for it, if they provide for it, yes. They provide how an application shall be made. I do not know how to rule on it, I do not know what the rules provide.

Mr. MCSHANE: You say it is not in writing?

Mr. EVERETT:

Q. Did he make an application in writing for benefits?

A. It is not necessary for any member who is disabled to make application because the benefits are paid without any application being made on his part.

Q. Did he receive any benefits for injuries received December 15th, 1908 from the Relief Association.

Mr. MCSHANE: Wait a minute, wait a minute. If there is anything—the payment of benefits apparently was by check, and if those checks are the ones, thet show for themselves, and I do not think that this gentlemen ought to be permitted to indulge in any con-
557 clusion. I don't object to the checks, whether they are genuine or not, or any fact; but the conclusion whether he did or not, I object to that.

The COURT: Objection sustained.

Mr. EVERETT: Exception to the ruling.

To which ruling of the court the defendant by its counsel, then and there duly excepted.

Mr. MCSHANE: Any fact now about it, I don't object to any fact about it — all.

Mr. EVERETT: Do you know how much money has been paid to Mr. Wagner, if any, for the injuries he received December 15, 1908 out of the Relief Benefit Associteion?

Mr. MCSHANE: Just a minute if ther- are—if the checks of — if there is any written evidence here of those payments I ask that be relied upon rather*m* than this gentlemen's summary. Apparently there are payments made. I don't know, but it appears so, and that i*d* the best evidence.

The COURT: The objection will be sustained.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

The COURT: There is no knowledge here that he kept the record of knows anything about it.

Mr. EVERETT:

Q. Do you know whether any money has been paid to the plaintiff in this case for the injuries that he received December 15th, 1908?

Mr. MCSHANE: I object to that unless it appears that I object to that on the ground that the writing is the best evidence of the payment, if there is any.

The COURT: What is the question?

558 (Question read.)

Mr. McSHANE: For the injuries and so forth, that is a conclusion. I do not object to this, I do not object to this if this gentleman will confine himself to the statement that he knew how much money was paid, I don't object.

Mr. EVERETT: Just make your objection to the question.

The COURT: The Court is going to rule. If he knows what has been paid he may answer that.

Mr. McSHANE: All right.

The COURT: Of his own knowledge.

Mr. McSHANE: Of his own knowledge.

A. I do.

Mr. EVERETT:

Q. Has any money been paid him?

Mr. McSHANE: Wait a minute, I would like to ask, I would like to know this first whether the gentleman is basing his own knowledge upon the examination of the books or papers, or whether he saw payments? If in other words he is basing it on secondary matter or on papers or books why that is the best evidence.

The COURT: Yes, that is a matter of cross examination. He says he knows now.

Mr. McSHANE: All right, all right.

Mr. EVERETT: Was there any money paid him, as I have stated?

A. There was.

Q. How much?

Mr. McSHANE: I think that the Court—if you know of your own knowledge.

Mr. EVERETT: I object to counsel talking to the witness.

The COURT: Yes.

559 Mr. EVERETT: And talking to everybody around the room here.

The COURT: Yes. Proceed.

A. Why the amount paid him there was a little over $1,200.00 I have a memorandum of the exact amount, I cannot carry all of these items in my head.

Mr. EVERETT:

Q. Have you that memorandum with you?

A. Yes sir.

Q. By looking at it, does it refresh your recollection so that you can tell the exact amount?

A. Yes.

Q. Will you kindly look at it. Did you make that memorandum?

A. Yes, sir, it was made up under my direction and I compared it with the other figures.

Mr. McSHANE: Now you see, your Honor, he has compared it with the records apparently kept by somebody else apparently. He apparently, if you ask the question, did nit pay this man any money or did not see any money paid.

Mr. EVERETT:

Q. Do you know of your own knowledge whether or not the amount stated on this memorandum is the correct amount paid to him?

Mr. McSHANE: Wait a minute. I want to make this objection, your Honor. This man is an intelligent man. I do not want him under the guise of not understanding this thing, to answer. As I understand, the court ruled if he knows of his own knowledge of the payment to this man it is competent for him to say, if he is simply relying on some vouchers, books, or something of that kind it is not competent for him to say, isn't that correct, your Honor?

The COURT: That is right.

Mr. McSHANE: Now you are on your oath, you are answering what you know.

Mr. EVERETT: I object to counsel intimidating the witness.

560 Mr. McSHANE: No, I am not. It is clear the witness does not know these things of his own knowledge.

The COURT: Proceed, gentlemen.

Mr. EVERETT: Read the question.

(Question read.)

Mr. EVERETT: Will you answer that, Mr. Redfern?

The COURT: Did you make an objection to that, Mr. McShane?

Mr. McSHANE: Yes. Your Honor.

The COURT: The objection will be sustained.

Mr. EVERETT: Does the court rule that he may not refresh his recollection from this memorandum?

The COURT: No sir. He put in part of an answer that is bad.

Mr. EVERETT:

Q. Will you refer to the memorandum and refresh your recollection if you can, and tell us then how much actually has been paid to him as benefits as aforesaid?

A. May I ask your Honor a question?

Q. No, just go ahead.

Mr. McSHANE: Yes.

The WITNESS (continuing): In connection with the question of personal knowledge, I want to protect myself.

Mr. McSHANE: Yes, ask the question.

A. The transaction of a large business, the payment of money by checks, I cannot see each check cashed in, the cashier's office. The money is disbursed under my direction by checks being drawn, which come back into my office after they are cashed, and I give credit to the treasurer of the Company for the amount paid out by him.

Mr. McSHANE: Let me say this, your Honor.
561 The COURT: I think I understand the situation.

A. I would like your Honor to say whether, when I say that this money has been disbursed to my personal knowledge, whether I am stating it correctly, because if I did not and I was accused of an abuse of a truct fund, I could not hide behind the fact that I did not know anything about the disbursal of the money.

The COURT: That is a different proposition from what is here now. The question that you are supposed to answer depends entirely on your personal knowledge, and not on the knowledge acquired from seeing the figures or anything.

The WITNESS: May I ask your Honor this? If you owe a bill and you draw your personal check for it and the check comes back endorsed from the bank, from the bank do you know that you have paid the bill.

Mr. McSHANE: Let me make this suggestion. I do not want to keep anything out. I will admit Mr. Wagner received the money represented by each one of these checks. I do not question that at all.

Mr. EVERETT: That is the 29 checks or thereabouts marked Defendant's Exhibit 2.

Mr. McSHANE: Yes, I do not question that at all.

Mr. EVERETT:

Q. Beside the payment of these checks were there any other payments made for Mr. Wagner eother for doctor's bills, hospital bills, medicine or other disbursements in reference to his disability which he sustained?

Mr. McSHANE: To that I urge an objection, that it must be by this gentleman's own knowledge, not his book.

The COURT: Yes, personal knowledge.

Mr. McSHANE: Or not from somebody else's account.

A. May I ask the same question as to the checks?

Mr. EVERETT:

Q. Do you personally——

562 The COURT:

Q. Did you draw the checks?
A. I signed the checks.
Q. Dod you know what they were for when you signed them?
A. I knew what they were for when, I signed them, yes.

Mr. McSHANE: Well, this would be the best evidence, those would be the best evidence, those checks. If you have them I do not object to them.

Mr. EVERETT: I do not think there is any better evidence than the man with his personal knowledge of it.

Mr. McSHANE: I think it is a whole lot.

Mr. EVERETT: Not at all. We are not suing on any instrument

here, we are calling for an ultimate fact whether he has disbursed them.

Mr. McSHANE: I object to it, your Honor.

The COURT: Well, if he persists in the objection, the objection will have to be sustained. The Checks are the best evidence.

Mr. EVERETT: Exception.

To which ruling of the Court the defendant, by its counsel then and there duly excepted.

Mr. EVERETT:

Q. Do you know whether or not any moneys were paid on behalf of Mr. Wagner, for the injuries which he received in being cured and treated.

Mr. McSHANE: I object to that, to the conclusion involved in the question. If there was any money paid on account of Wagner that he knows of, I don't object, but I object to his conclusion as to what they are for.

The COURT: Your question is bad, Mr. Everett.

Mr. EVERETT: Well, if he knows whether there has been any money paid.

The COURT: Yes, the latter part of your question draws a conclusion.

563 Mr. McSHANE: Yes.

Mr. EVERETT:

Q. Do you know whether or not any money was paid by the Burlington Relief Department on behalf of Mr. Wagner, other than you have stated in reference to the papers?

Mr. McSHANE: Other than these checks?

Mr. EVERETT: Yes.

The WITNESS:

A. Yes, there was.

Mr. EVERETT:

Q. How much?

A. Thirteen hundred and some odd dollars, I have the vouchers but I have not, I cannot recall the details.

Q. Have you the vouchers here?

A. Yes.

Mr. McSHANE: Including these checks, that is besides these checks, in addition to them.

Mr. EVERETT: Besides these checks.

Mr. McSHANE:

Q. Bisides these checks, did you understand this question?

A. What is the question, I didn't hear it.

Mr. McSHANE: His question was——

Mr. EVERETT: My question——

The COURT: Just a minute, let him examine.
Mr. MCSHANE: Excuse me, I thought he was mistaken.

Mr. EVERETT:

Q. Did you understand me to say—you did, didn't you—that that was in addition to those checks?
A. In addition to the money paid Mr. Wagner directly.
Q. Yes, Have you a memorandum that will refresh your recollection as to the exact amount.
A. I have the receipted vouchers of the physicians and the hospitals.
Q. Have you those with you.

(Witness produces documents.)

564 Mr. EVERETT: Do you care to have all these go in the records or can he just total it, or just let him total them?
Mr. MCSHANE: No, I want them to go in the record, just what they are, I do not object to him saying what they add up, I don't object to that.

Mr. EVERETT: How much do they add up, do you know?
A. $1,349.59.

Mr. MCSHANE: I am willing that they shall go in under this general objection.
Mr. EVERETT: Do you want these to go in at all?
Mr. MCSHANE: Yes, I do. I want thw whole thing about them and what they are for.

Mr. EVERETT:

Q. Well, you have the bills there, too haven't you?
A. Some correspondence attached to them. That is the receipt of the doctor for the money that was paid him.
Mr. MCSHANE: What they are paid for ought to go in and the bill ought to go in.
A. It shows on the face of it.
Mr. EVERETT: Does it show right here (indicating)?
A. Yes.
Q. Yes, it shows on here. Are there any more?
A. No, I think that is all. Better have them totaled up to see if it makes $1,349.59.
Q. Wrere there any disbursements made besides the two items you have given now, that is $1,300 and some odd dollars, and these checks Exhibit 2?
A. No.
Mr. MCSHANE: Have you the bills there that were rendered?
A. There is some bills with correspondence that I detached.

Mr. MCSHANE: Well, the bills ought to go, too, they ought to go in with the checks.

565 Mr. EVERETT:

Q. Have you any objections to letting them go in?
A. There is various marks, I don't know we have seen fit to cut

down some of the bills of the doctors. This (indicating) is our certificates that we paid a certain amount of money, and the receipt of the doctor (indicating).

Mr. McSHANE: Well, we ought to have these bills and checks.
Mr. EVERETT: I will let you look at them.
Mr. McSHANE: They ought to go in evidence what these are for.

Mr. EVERETT:

Q. During the year——

Mr. McSHANE: Just a minute.
Mr. EVERETT: You can cross examine, if you want to.
Mr. McSHANE: No. I say that all the checks ought to go in and the bill should go in, that is my offer. I am willing they should all go in, that they should all go in. If the bills and checks go in together I have no objection but I would like to have the checks go in. I would not be willing to have the checks go in without showing what they are for.
Mr. EVERETT: It shows on the face of the check.
Mr. McSHANE: I do not care.
Mr. EVERETT: Well——
Mr. McSHANE: I don't care, I don't think *ir* is competent but I am willing to concede it all.
Mr. EVERETT: Very well then.

Q. Get your bills out then.
A. I*w* will get them out but it will take some time.
Mr. McSHANE: They will be attached.
The WITNESS: I will attach them if they are desired, I have no serious objections to it.
Mr. McSHANE: Well, that shows it, yes.
Mr. EVERETT: Yes.
Mr. McSHANE: That will be understood that the bills will be attached to them.
The WITNESS: I will do it after I get through here.
566 Mr. EVERETT: Then these vouchers and checks and bills go in in a bunch. There are eleven vouchers. They go in as Defendant's Exhibit 12.
(Which said vouchers last above referred to, together with the bills attached thereto, being offered and admitted in evidence, were thereupon marked Defendant's Exhibit 12) and said vouchers and the bills attached thereto, are in words and figures as follows: to-wit:)

567 Burlington Route.

Dr. Fred J. E. Ehrmann, Chicago, Ill.

Received of the Relief Fund of the Relief Department of the Chicago, Burlington & Quincy Railroad Co. Twenty Five and no/100 Dollars in full for surgical treatment rendered Joseph Wag-

ner a member of said Relief Fund, Certificate No. 77541, who was injured on or about Dec. 15, '08.

FRED J. E. EHRMANN.
Signature.

Chicago, March 6, '09.
Place and Date.

District No. 1.
Voucher No. 1911.
Order No. 50215.

$25.00.
Occ. Swman.
Div. Chgo.

Approved

J. A. DENNEY,
Medical Director.

Stamped on back: C. B. & Q. R. R. Co., General Office Mar. 9, 1909. Relief & Employment Departments.

Defendant's Exhibit 12.

568 *Bill Attached to Voucher No.* 1911.

CHICAGO, Dec. 17, 1908.

Merrick, Burlington Relief.

Fred J. E. Ehrmann, M. D., 932 West 22nd Street.

Office Cor. 21 and Leavitt Sts.
Hours 8-9 A. M.; 1-2 P. M.; 7-8 P. M.; Wednesday and Sunday 1-2 P. M. only.
Telephones: Office, Canal 1283; Res. Canal 367.

To professional services as first service to Mr. Wagner, injured Dec. 15th including consultation $25.00.

Paid on account.

O. K. not cashed.

6033–12203
6008–11203
Cert. 77541.

Approved for $25.

J. A. DENNEY,
Medical Director.

Voucher No. 1911.

J. H. MERRICK,
Med. Ex.

O. K. to pay.

J. A. D.

Balance due —.
Bills are due and payment desired when services are rendered.
Received payment.

569 Burlington Route.

Dr. A. D. Bevan, Chicago, Ill.

Received of the Relief Fund of the Relief Department of the Chicago, Burlington & Quincy Railroad Co., Twenty Five and no/100 Dollars in full for Examination and report rendered Joseph Wagner a member of said Relief Fund, Certificate No. 77541 who was injured on or about Dec. 15, '08.

ARTHUR DEAN BEVAN.
Signature.

Chicago, Apr. 12, '09.
Place and Date.

District No. 1.
Voucher No. 2880.
Order No. 52928.

$25.00.
Occ. Swman.
Div. Chgo.

Approved:

J. A. DENNEY,
Medical Director.

570 *Bill Attached to Voucher No.* 2880.

Office, 100 State Street, Suite 600.

Presbyterian Hospital, Congress & Wood Sts.

Phone Central 556. Phone West 1834.

M. C., B. and Q. Office to Dr. Arthur Dean Bevan, Dr.

To examination and report on J. Wagner, St. Anthony Hospital $25.00

Approved for $25.00. B.

J. A. DENNEY,
Vc. #2880.

O. K. not cashed.
Pay special.
J. A. D. 4/10/09.

571 Burlington Route.

Hospital of St. Anthony de Padua, Chicago, Ill.

Received of the Relief Fund of the Relief Department of the Chicago, Burlington & Quincy Railroad Co., One thousand fifty eight & 59/100 Dollars in full for hospital treatment Dec. 15, '08, to Jul*t* 27, '09, rendered Joseph Wagner a member of said Relief

Fund, Certificate No. 77541, who was injured on or about Dec. 15, '08.

SISTER M. LIOBA, *Supr.*
Signature.

Chicago, Aug. 14, 1909.
Place and Date.

District No. 1.
Voucher No. 4704.
Order No. 58895.

$1,058.59.
Occ. Swman.
Div. Chgo.

Approved:

J. A. DENNEY,
Medical Director.

Stamped on Back: C. B. & Q. R. R. Co., General Office, Aug. 17, 1909. Relief & Employment Departments.

572 *Bill Attached to Voucher No.* 4704.

CHICAGO, July 29, 1909.

8/4/09.

Mr. Joseph Wagner, Switchman, C., B. & Q. R. R. Co., to Hospital of St. Anthony de Padua, Dr., West 19th St. and Marshall Blvd.

To room, board, & Hospital attendance from Dec. 15, 1908, to July 27, 1909:

24 weeks 2 days at 40 per week including Special Nurse..	$971.44
From June 3, to July 27, 7 weeks 5 days at 10 per week..	77.15
Operating Room Fee.....	10.00
Amount due	$1,058.59

Medical Examiner
Aug. 3, 1909,
Western Ave., Chicago.

6033-12203.
Cert. 77541.

J. B. JACK.

Approved for $1,058.59.

J. A. DENNEY,
Medical Director.

Voucher No. 4704.

(Cks. not cashed but pay J. A. D.)

573 Burlington Route.

Dr. Lawrence Ryan, Chicago, Ill.

Received of the Relief Fund of the Relief Department of the Chicago, Burlington & Quincy Railroad Co. Twenty Five and no/100 Dollars in full for surgical treatment rendered Joseph Wagner, a member of said Relief Fund, Certificate No. 77541, who was injured on or about Dec. 15, '08.

DR. LAWRENCE RYAN.
Signature.

Chicago, Oct. 13, '09.
Place and Date.

District No. 1.
Voucher No. 5577.
Order No. 62136.

$25.00.
Occ. Swman.
Div. Chgo.

Approved:

J. A. DENNEY,
Medical Director.

Stamped on back: C. B. & Q. R. R. Co., General Office. Oct. 16, 1909. Relief & Employment Departments.

574 *Bill Attached to Voucher No.* 5577.

CHICAGO, ILL., Sept. 1st, 1909.

Medical Examiner.
Sept. 17, 1909.
Western Ave., Chicago.

9/18/09.

Mr. Burlington Relief for Mr. Joseph Wagner to Lawrence Ryan, M. D., Dr.

Office 100 State St.
Hours: 2 to 3:30 P. M.
Tel., Randolph 345.

Res. 3520 Jackson Boulevard.
Hours: 12 to 1:30, 7 to 8:30.
Tel. Kedzie 1622.
Old No. 1649 Jackson Boulevard.

Statement Rendered.

Professional Service assisting Dr. F. J. *F. J.* Ehrmann at St. Anthony's Hospital $25.00

Approved for $25.

J. A. DENNEY,
Medical Director.

Voucher No. 5577.

575 Burlington Route.

Hospital of St. Anthony de Padua, Chicago, Ill.

Received of the Relief Fund of the Relief Department of the Chicago, Burlington & Quincy Railroad Co., Ninety and no/100 Dollars in full for hospital treatment July 27 to Sept. 28, '09 rendered Joseph Wagner a member of said Relief Fund, Certificate No. 77541 who was injured on or about Dec. 15, '08.

SISTER M. LIOBA, *Supr.*
Signature.

Chicago, Nov. 19, 1909.
Place and Date.

District No. 1. $90.00.
Voucher No. 6256. Occ. Swman.
Order No. 64270. Div. Chgo.

Approved.

J. A. DENNEY,
Medical Director.

Stamped on Back: C. B. & Q. R. R. Co., General Office. Nov. 20, 1909. Relief & Employment Departments.

576 *Bill Attached to Voucher No.* 6256.

CHICAGO, Oct. 5, 1909.

10/8/09.

Mr. Joseph Wagner, Switchman, to Hospital of St. Anthony de Padua, Dr., West 19th St. and Marshall Blvd.

To room, board & care from July 27, to Sept. 28—9 weeks at $10.00 ..... $90.00

Medical Examiner, 6033-12203.
Oct. 7, 1909, Cert. 77541.
Western Ave., Chicago.

Recommended.

J. B. JACK.

Approved for $90.00.

J. A. DENNEY,
Medical Director.

Voucher No. 6256.

577 Burlington Route.

St. Joseph's Hospital, Denver, Colo.

Medical Examiner,
Mar. 19, 1910,
Denver, Colo.

Received *of* the Relief Fund of the Relief Department of the Chicago, Burlington & Quincy Railroad Co. fourteen and 50/100 Dollars in full for Hospital treatment Jan. 21, '10 to Jan. 31, '10, rendered Joseph Wagner, a member of said Relief Fund, Certificate No. 77541, who was injured on or about Dec. 15, 1909.

ST. JOSEPH'S HOSP.
SISTER MARY ANTHONY, *Sec'y.*
Signature.

Mar. 21.
Place and Date.

District No. 24.
Voucher No. 9142.
Order No. 71163.

$14.50.
Occ. Swm.
Div. Chgo.

Approved.

J. A. DENNEY,
Medical Director.

Stamped on back: C. B. & Q. R. R. Co. General Office. Mar. 25, 1910. Relief Department and Employment Department.

578 *Bill Attached to Voucher No. 9142.*

Telephone York 10.

DENVER, COLO., Mar. 10, 1910.

J. Wagner, Dist. —, Chicago, to St. Joseph's Hospital, Dr.
(Sisters of Charity), Eighteenth Avenue and Humboldt Street, for care and maintenance of J. Wagner. Payable every week in advance. From Jan. 21 to Jan. 31..... $14.50

(Medical Examiner.)
(Mar. 10, 1910.)
(Denver, Colo.)

Resp'y Referred.

G. W. CURFMAN.

Acct. O. K.

Approved for $14.50. B.

J. A. DENNEY,
Medical Director.

Voucher No. 9212.

579 Burlington Route.

Medical Examiner.
June 27, 1910.
Denver, Colo.

Dr. Leonard Freeman, Denver, Colo.

Received of the Relief Fund of the Relief Department of the Chicago, Burlington & Quincy Railroad Co. Ten and no/100 Dollars in full for surgical treatment rendered Joseph Wagner, a member of said Relief Fund, Certificate No. 77541, who was injured on or about Dec. 15, '08.

DR. LEONARD FREEMAN.
Signature.

Denver, June 28, 1910.
Place and Date.

District No. 24.
Voucher No. 265.
Order No. 78012.

$10.00.
Occ. Sw'm'n.
Div. Ch'go.

Approved.

D. B. MOSS,
For Medical Director.

Stamped *on* back: C. B. & Q. R. R. Co., Central Office. July 2, 1910. Relief & Employment Departments.

580 *Bill Attached to Voucher No. 265.*

Office, 330 Majestic Building.
Phone Main 1802.

Residence, 1374 Elizabeth St.
Phone York 595.
75188.

Dr. Kurfman.

Medical Examiner.
Apr. 23, 1910.
Denver, Colo.

Office Hours: 2 to 4 P. M.
Sundays by appointment.

DENVER, COLO., Apr. 21, 1910.

Josrph Wagner to Dr. Leonard Freeman, Dr., to Professional Services Rendered Mr. Wagner..... $10.00

J. A. D.:

Dr. Freeman saw this case a number of times to my knowledge before and after Wagner entered the hospital. The bill, I consider very low.

Paym't Resp'y Rec.

GEO. CURFMAN.

Approved for $10.00.

D. B. MOSS,
For Medical Examiner.

Voucher No. 265.

Stamped on back: C. B. & Q. R. R. Co., Relief Department, April 25, 1910, General Office.

581 Burlington Route.

Dr. Fred J. E. Ehrmann, Chicago, Ill.

Received of the Relief Fund of the Relief Department of the Chicago, Burlington & Quincy Railroad Co. Nineteen and 50/100 Dollars in full for Surgical treatment rendered Joseph Wagner, a member of the said Relief Fund, Certificate No. 77541, who was injured on or about Dec. 15, '08.

FRED J. E. EHRMANN.
Signature.

Chicago, July 15th, '10.
Place and Date.

District No. 1.
Voucher No. 1156.
Order No. 78957.

$19.50.
Occ. Sw'm'n.
Div. Ch'go.

Approved. C.

D. B. MOSS,
For Medical Director.

Stamped on back: Medical Examiner, Jul. 18, 1910. Western Ave., Chicago. C. B. & Q. R. R. Co. General Office. July 18, 1910. Relief & Employment Departments.

582 *Bill Attached to Voucher No. 1156.*

Medical Examiner,
June 6, 1910,
Western Ave., Chicago.

CHICAGO, June 3, 1910.

Jos. Wagner, c/o Burlington Relief.

Fred J. E. Ehrmann, M. D.

Office: 2158 W. 21st Street, Cor. Leavitt Street.

Residence,
2101 West 22nd Street.
6/7/10.

Hours: 8–9 A. M.
1–2 P. M.
7–8 P. M.
Wednesday and Sunday, 1–2 P. M. only.

Telephones, Office, Canal 1283. Res., Canal 367.

To Professional Services at office and home from Nov. 1st, 1909, to June 2, 1910..... $19.50

Paid on account.
(In pencil:) 6033-12203, Cert. 77541. J. B. Jack.
Approved for $19.50.

D. B. MOSE,
For Medical Director.

Voucher No. 1156.

Total Paid.
Bills are due and payment desired when services are rendered.

583 Burlington Route.

Dr. Fred J. E. Ehrmann, Chicago, Ill.

Received of the Relief Fund of the Relief Department of the Chicago, Burlington & Quincy Railroad Co. Thirty-two and no/-00 Dollars in full for surgical treatment rendered Joseph Wagner, a member of said Relief Fund, Certificate No. 77541, who was injured on or about 12/15/08.

FRED J. E. EHRMANN.
Signature.

Chicago, Fen. 6, 1911.
Place and Date.

District No. 1.
Voucher No. 6247.
Order No. 90464.

$32.00.
Occ. Sw'm.
Div. Ch'go.

Approved:

J. A. DENNEY,
Medical Director.

Stamped on Back: C. B. & Q. R. R. Co. General Office. Feb. 8, 1911. Relief & Employment Departments.

584 *Bill Attached to Voucher No. 6247.*

CHICAGO, Dec. 22, 1910.

Mr. Jos. Wagner, Member Burlington Relief.

Fred J. E. Ehrmann, M. D.

Office: 2158 W. 21st Street, Cor. Leavitt Street.

Residence,
2101 West 22nd Street.
Cor. Hoyne Ave.

Hours: 8–9 A. M.
1–2 P. M.
7–8 P. M.
Wednesday and Sunday, 1–2 P. M. only.

Telephones, Office, Canal 1283. Res., Canal 367.

To professional services—June 7, 1910, to Dec. 21st, 1910—
20 office calls and one visit at house..... $32.00

Paid on account.
Cert. 7764.

Approved for $32.

J. A. DENNEY,
Medical Director.

Voucher No. 6247.

Total Paid.
Balance due.
Bills are due and payment desired when services are rendered.
Received payment.

585 Burlington Route.

Dr. Peter Bassoe, Chicago, Ill.

Received of the Relief Fund of the Relief Department of the Chicago, Burlington & Quincy Railroad Co., Twenty-five and No/00 Dollars in full for surgical treatment rendered Joseph Wagner, a member of said Relief Fund, Certificate No. 77541, who was injured on or about 12/15/08.

PETER BASSOE.
Signature.

Chicago, Mch. 30, 1911.
Place and Date.

District No. 1.
Voucher No. 7676.
Order No. 94420.

$25.00.
Occ. Sw'm.
Div. Ch'go.

Approved:

J. A. DENNEY,
Medical Director.

Stamped on back: C. B. & Q. R. R. Co. General Office. March 31, 1911. Relief & Employment Departments.

586 *Bill Attached to Voucher No. 7676.*

CHICAGO, March 3, 1911.

C. B. & Q. Ry. Co., % Dr. Arthur Dean Bevan, Chicago, to Dr. Peter Bassoe, 34 Washington St., Telephone Randolph 2724, for Professional services, 3/3/11, examination of Joseph M. Wagner..... $25.00

Approved for $25.
7676.
Received payment.

J. A. DENNEY.

587 Burlington Route.

Dr. Arthur Dean Bevan, Chicago, Ill.

Received of the Relief Fund of the Relief Department of the Chicago, Burlington & Quincy Railroad Co. Twenty Five and no/100 Dollars in full for surgical treatment rendered Joseph Wagner, a member of said Relief Fund, Certificate No. 77541, who was injured on or about 12/15/08.

ATHUR DEAN BEVAN.
Signature.

Chicago, March 30.
Place and date.

District No. 1.
Voucher No. 7677.
Order No. 94422.

$25.00.
Occ. Sw'm.
Div. Ch'go.

Approved:

J. A. DENNEY,
Medical Director.

Stamped on Back: C. B. & Q. R. R. Co. General Office. Mar. 31, 1911. Relief and Employment Departments.

588 *Bill Attached to Voucher No. 7677.*

Office
150 Michigan Av., Suite 1401.
Phone Central 556.

Presbyterian Hospital,
Congress & Wood Sts.
Phone West 2740.

MARCH 9, 1911.

M. Chicago, Burlington & Quincy R. R., Chicago, to Dr. Arthur Dean Bevan, Dr., 3/3/11, to examination of Jos. M. Wagner $25/

Approved for $25.

J. A. DENNEY.

7677.

589 Mr. EVERETT:

Q. Did the Chicago, Burlington & Quincy Railway Company in 1908 contribute any money to the support of the Relief Department?

Mr. MCSHANE: Just a minute. On this branch of the case I ask that he make proof in a legal way, that this gentleman be required to confine his answers to what he knows of his own knowledge, money that came to his hands, not by reference to books or records kept by anybody but himself; if he refers to books or records they ought to be produced. I ask that he make this proof correctly.

Mr. EVERETT:

Q. Don't let that worry you any. Please answer the question, if you know.

A. Shall I answer?

Q. Yes.

A. The question was whether the railway—the railroad Company, not the railway company, but the Chicago, Burlington & Quincy Railroad Company did pay money in the year 1908 to the support of the Relief Department.

Q. Yes. Do you know how much?

Mr. MCSHANE: Just a minute. I thought the question was whether he knew or not.

Mr. EVERETT: Yes, he said yes.

Mr. MCSHANE: Yes. He said it did pay?

Mr. EVERETT: Yes.

Mr. MCSHANE: I object to that. The first answer is that he did know. Then if he answers that he knows, then as to the next question as to whether he knows how much, I object; that is, then if he asks if he knows how much, I want to object to that.

The COURT: The question will be limited to whether he knew.

Mr. EVERETT: Yes, I asked him that.

Mr. MCSHANE: May it all go out except that he knew it?

The COURT: Yes, that goes out.

590 Mr. EVERETT:

Q. Do you know whether—you have answered that you knew.

Mr. MCSHANE: He answered that it did.

Mr. EVERETT:

Q. Did it pay any——

Mr. MCSHANE: Wait a minute. I object unless he be instructed to say what he knows of his own personal knowledge.

The COURT: Yes, unless he handled the money and the vouchers and knew, from his own personal taking care of the business.

Mr. EVERETT: I think that that warning is unnecessary because I don't want the witness to answer anything that he does not know of his own personal knowledge. So we will have that understanding. I object to counsel saying that.

Mr. MCSHANE: It is apparent that he did not.

Mr. EVERETT: I object to the statement that it is apparent that he did not.

Mr. MCSHANE: It is apparent from his other answers that he has been referring to other notes and books.

Mr. EVERETT: I object to that statement, it is improper.

The COURT: Proceed, gentlemen.

Mr. EVERETT: Will the court rule on the remark of counsel?

The COURT: Well, those remarks that have been made, as to those remarks I suggested to counsel on both sides that this colloquy is not necessary and we can get along without it.

Mr. EVERETT: No, but the court understands that when counsel makes a remark, I cannot review that unless there is a ruling and an exception taken.

The COURT: Well——

591 Mr. EVERETT: That is the reason I have done that.

The COURT: Well, the court will instruct the jury to disregard the remarks of counsel except on the argument.

Mr. EVERETT: Exception to his remarks.

To which remarks of counsel by the plaintiff the defendant by his counsel, then and there duly excepted.

Mr. EVERETT:

Q. The question was, did the Chicago, Burlington & Quincy Railroad pay or contribute anything to this Relief Department.

Mr. MCSHANE: I do not object to his own knowledge, but if it is otherwise, in the books, I do object.

The COURT: Proceed and answer the question.

A. It did.

Mr. EVERETT:

Q. How much did it pay in 1908?

Mr. MCSHANE: Same objection, your Honor.

The COURT: Answer the question.

A. A little over eighty-one thousand dollars.

Mr. EVERETT:

Q. How much in 1909?

Mr. MCSHANE: Same objection.

A. About $78,000.00.

Mr. EVERETT:

Q. How much in 1910?

A. I think it was about $85,000, a little over $85,000.00.

Mr. EVERETT: In addition to that payment that you have mentioned has the Burlington Railroad Company during those three years contributed in any other way as to the support of the Relief Department?

A. It has.

Q. In what way?

A. It has furnished, without making any item or charge on its books as expense, in carrying on the work of the Relief Department, the rent of the general offices of the department, in the general office building of the road in Chicago.

592 Q. How much space does the Relief Department occupy?

A. About three thousand, three thousand square feet.

Q. Do you know what the reasonable and usual rental for such space, as the place where you- relief department is located is worth, do you know?

A. I do.

Q. How much?

A. Not less than a dollar and a half a square foot.

Q. How much does that make for a year?

A. About $4,500.00.

Q. Has the Burlington Railroad Company for the three years mentioned contributed in any way for the support of the Relief Department?

A. It has furnished, without making any charge on its books, the offices of the various medical examiners that are owned by the company, that is the buildings owned by the company; the use of the mail, telegraph, telephone and free transportation; the collection of contributions on the pay-rolls without making any charge for the work involved; the soliciting for membership; the carrying on of all the details of the work, in respect to supporting men who are disabled; when they are able to work; in order that the account part of the work may be carried on properly and without loss; the facilities of all departments of the road, including the law department; the sums that I have mentioned simply being when money was paid out such as salary of the officers and medical examiners and clerks of the Relief Department whose whole time is devoted to relief department work, and their private expenses, and the money actually spent for stationery and printing.

—. Has the company, the Burlington Railroad stood that expense without reimbursement from the Relief Department?

593 A. It has.

Q. Under this agreement, under the rules and regulations

of the department, the Burlington Railroad Company agrees to make up any shortage that there is——

Mr. McSHANE: I object to reciting the terms of that.

Mr. EVERETT: It is in evidence. I want to form a question on that and it is necessary to put it in this way, in this form.

The COURT: Well, formulate your question.

Mr. EVERETT: Read the question as far as I got.

(Question read.)

Mr. EVERETT:

Q. (continued). Or deficiency in the payments of benefits to the man, that is true, isn't it?

The COURT: The objection will be sustained.

Mr. EVERETT:

Q. Well, they agree to make up the deficiency——

Mr. McSHANE: I object to that.

Mr. EVERETT:

Q. Do you know whether during the three years the Burlington has complied with that provision of the rules and regulations?

Mr. McSHANE: I object to that, that is not proper.

The COURT: Objection sustained.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. EVERETT:

Q. Do you know whether or not the Burlington Railroad Company has performed all the parts of the agreement mentioned in the rules and regulations of the Relief Department——

Mr. McSHANE: Wait, wait, I object to that.

Mr. EVERETT: Don't "wait, wait," don't say that.

Mr. McSHANE: I thought you had finished.

Mr. EVERETT: You get me excited and I forget what I want to ask him.

594 The COURT: Proceed.

Mr. EVERETT: Read the question as far as I got.

(Question read.)

Mr. EVERETT:

Q. (continued). By it to be performed during the years 1908, 1909 and 1910 down to date.

Mr. McSHANE: I object to that, if your Honor please, being a conclusion, did one man perform his contract, I object to that as a conclusion pure and simple.

Mr. EVERETT: No other way that you can get at it that I know of.

The COURT: That is what I was looking at.

Mr. EVERETT: There are certain obligations in here on the part of

the Company, and certain obligations on the part of the men. I want to show that the company has held up its part and Wagner has held up his, that they both have. This is the man that is in charge.

The COURT: If he is keeping the record, he ought to be able to testify?

Mr. EVERETT:

Q. You are in charge there, are you not, of this Relief Department?

A. I am.

Q. All these matters pass through your hands?

A. They do.

Q. Now, do you know whether or not the Burlington Railroad Company has complied with that part of the regulations that imposes on it the duty of doing certain things——

Mr. MCSHANE: I object to that, your Honor. You might in a law suit ask a man if he performed his contract. Let him ask what was done. It is a matter of law. He cannot give a conclusion and say, yes, I performed my contract and then sit down. I object to it.

595 The COURT: There ought to be some other way of proving that fact.

Mr. EVERETT:

Q. What is that Relief Department, a corporation or an association.

Mr. MCSHANE: I object to that, it shows for itself.

Mr. EVERETT: Where does it show?

Mr. MCSHANE: Don't the books show.

The COURT: If he knows, he can tell what it is.

Mr. MCSHANE:

Q. Is it a corporation?

A. It is a department of the Company's service.

Mr. MCSHANE: I except to that and move to strike it out, your Honor.

Mr. EVERETT: I think it is proper.

Mr. MCSHANE: "A department of the company's service." There is a contract there that speaks for itself, and the legal effect of that is not for the witness to pronounce.

The COURT: The answer will be stricken out.

Mr. EVERETT: Exception.

To which ruling of the court the defendant by its counsel then and there duly excepted.

Q. Is the Relief Department a separate corporation?

A. It is not.

Q. What is it, what kind of an organization is it?

Mr. MCSHANE: If it is in writing, that is the best evidence. I object to this man telling his notion about it. If in writing, that is all right.

The COURT: Yes, it is in evidence.
Mr. MCSHANE: It is all there, is it?
Mr. EVERETT: Yes sir, and in evidence.
The COURT: The objection will be sustained.
Mr. EVERETT: Exception.
596 To which ruling of the court the defendant by its counsel then and there duly excepted.

Q. What are the requirements under the regulations that are to be performed by the Chicago, Burlington and Quincy Railroad itself in reference to the relief department?

Mr. MCSHANE: I object to that, the writing shows.
The COURT: Objection sustained.
Mr. EVERETT: Exception.
To which ruling of the court the defendant by its counsel then and there duly excepted.
Mr. EVERETT: I don't know that this book of rules does set it out?
Mr. MCSHANE: It sets out the whole business.
Mr. EVERETT: Have you read it?
Mr. MCSHANE: I have read books like it time and again.

Mr. EVERETT:

Q. Does this book set out the applications of the employes?
A. It does.
Q. Is there a direct contract between the Burlington Railroad Company and the Relief Department of that Company?

Mr. MCSHANE: I object to that your Honor. It shows for itself.
The COURT: Sustained.
Mr. EVERETT: Exception to the ruling.
To which ruling of the court the defendant by its counsel then and there duly excepted.
Mr. MCSHANE: If something else besides that, I don't object, something besides what is shown there, I won't object to that.

Mr. EVERETT: What has the Burlington Railroad Company done in reference to the regulations of the Relief Department in 1908, 1909, 1910 and up to date that you know of?
597 A. It has carried out its agreement.

Mr. MCSHANE:

Q. Besides what he has already stated.

Mr. EVERETT: I object to counsel interrupting.
Mr. MCSHANE: I don't want him to go over the same thing again. If there is anything he hasn't stated, I have no objection to that.
The COURT: What is the question and answer.
Mr. EVERETT: I asked him what the railroad company had done with reference to the Relief Department.
Mr. MCSHANE: And I stated that he could tell beyond what he has already stated.
The COURT: Do you put that in your question?
Mr. EVERETT: Yes.

The WITNESS: I don't understand it, your Honor.
Mr. EVERETT: I don't put it in. If the witness can answer without it, I would like it.

Q. What has the Burlington railroad done in reference to the regulations of the Relief Department in 1908, 1909 and '10 and up to date?

Mr. MCSHANE: I want it limited to beyond what he has already stated.
The COURT: Objection sustained.
Mr. EVERETT: Exception.
To which ruling of the court the defendant by its counsel then and there duly excepted.

Mr. EVERETT:

Q. In addition to what you have already told.
A. It carried out its obligations.

Mr. MCSHANE: Wait, I object to "it carried out its obligations."
The COURT: Sustained, and the answer is stricken.
Mr. EVERETT: Exception.
To which ruling of the court the defendant by its counsel then and there duly excepted.

Mr. EVERETT:

Q. Just tell what it did do, Mr. Redfern.
598 A. It paid four per cent interest on monthly balances in its hands. It took charge of all moneys belonging to the Relief Fund and kept it safe, as well as the securities fund, and it furnished all necessary facilities for the carrying on of the work.
Q. Now, you gave an answer awhile ago, that the Burlington Railroad Company had to do in part with the relief department, a certain number of thousands of dollars in the year 1908, what was that in payment of.

Mr. MCSHANE: I object to that.
Mr. EVERETT: It is perfectly proper, if the court please. These rules provide that they shall make up the deficiency.
Mr. MCSHANE: Very well, go ahead.
The COURT: I will determine on the objection after I hear the answer.

The WITNESS: The 81 thousand odd dollars paid in 1908 78,000 I think it was in 1909, and 85,000 in 1910 was expenses—was money disbursed by the company on account of necessary work done in connection with the relief department, as I said, in paying the salaries of the officers, the various employes of the relief department and their traveling expenses and printing and stationery.

The COURT: You went over that before.
Mr. MCSHANE: He has been over that twice.
The COURT: Under the objection, the answer will be stricken out.
Mr. EVERETT: I object to its being stricken out. He just merely gave the amount before, and this time he has told what it is for.

The COURT: You were taking his testimony before, were you not?

599 Mr. MCSHANE: Well, to save time, I don't object.

The COURT: All right, the ruling will be reversed then.

Mr. EVERETT: In the year 1908, was there any deficiency in the department funds between the amounts paid out in benefits to the men, and the amount they had on hand?

A. There was not.

Q. Was there in 1909?

A. There was not.

Q. 1910?

A. There was not.

Q. Was there in 1911, down to date?

A. There was not.

Q. Mr. Wagner has continued as a member of that association and paid the dues required of him, hasn't he?

A. Yes, he has.

Q. What dues has he paid at the present time, do you know?

A. Not paying any now. While disabled a man don't have to pay anything.

Q. What did he pay as a switchman just before his accident.

Q. I would have to refer to our records in order to answer the question.

Q. Can you tell from the application?

A. I can.

Q. I think it is shown on the application.

Mr. MCSHANE: I think it is $3 a month, is that right?

The WITNESS: If there is $3 in there, that he paid up to that time, that he was injured, he has paid nothing since.

Mr. EVERETT:

Q. Look at Defendants' Exhibit 5 and tell us (Showing witness paper).

A. $3 a month.

Q. And when did he start to pay that?

A. Dating from the 1st day of April 1903.

Q. Prior to that he paid 75 cents a month?

600 A. Prior to that time he paid 75 cents a month.

Q. Do any part of the contributions made by the members of this association go to pay for the operating expenses of the relief department?

A. Do not.

Q. Has Mr. Wagner been paid the full amount that is due him under the——

Mr. MCSHANE: Go ahead, I thought you had finished you- question.

Mr. EVERETT: Read the question so far as I have gone.

(Question read.)

Q. Regulations of the Relief Department, from the time of his injury up to date.

Mr. McSHANE: I object to that your Honor.

Mr. EVERETT: If you know.

Mr. McSHANE: That is a pure conclusion. Let him tell what payment has been made to him and then it is for the jury to determine whether full or not:

The COURT: The objection will be sustained.

Mr. EVERETT: Exception.

To which ruling of the court the defendant by its counsel then and there duly excepted.

Mr. EVERETT: That is all.

Cross-examination.

By Mr. McSHANE:

Q. Mr. Redfern, is there a treasurer of the Relief Department?

A. The treasurer of the company is under the regulations ex officio treasurer of the relief fund.

Q. Is he a treasurer of the relief fund?

601 A. Well, under the regulations, I don't want to be too technical in my answer, the treasurer of the railroad company acts as treasurer of the relief fund.

Q. He is spoken of as treasurer of the relief fund, isn't he?

A. Not of the relief department.

Q. Is the moneys that were paid and received, paid by any one to the concern; they go to the treasurer, don't they?

A. I didn't catch that last part.

Q. All the funds that came to that association from every source, was paid to the treasurer of the relief department, wasn't it?

A. Not all.

Q. Well, practically all?

A. Part of the money is paid in my office.

Q. But the great majority of it is paid to the treasurer, isn't it, and not to you?

A. There is very little money handled.

Q. The moneys that are collected from the men, are collected by the railroad company and turned into the treasury of the department, is not that true?

A. That is largely of the same character of question. I am not fencing, Mr. McShane, I just want to explain the situation.

Q. Just answer my questions, or say you can't. Isn't it true that the railroad company collects from these men's pay each month, certain moneys, and those moneys are turned into the treasury of the railroad through its treasurer, who is the treasurer of the railroad, and the treasurer of the relief department, isn't that true?

Mr. EVERETT: I object to that. That is not cross examination. I kept it out because the rules provided for it. I wasn't permitted to go into it.

602 The COURT: He may answer.

Mr. McSHANE: Isn't that true.

Mr. EVERETT: Exception.

To which ruling of the court the defendant by its counsel then and there duly excepted.

The WITNESS:

A. There is very little money handled.

Mr. MCSHANE: Answer the question, yes or no, isn't it true that the moneys collected from the pay of the men belonging to this department, are collected by the railroad and in the regular order of events are turned into the company's official treasury, the treasury of this department and not to you personally, isn't that true?

A. It depends on what you mean by money. I don't know what you mean by money. I tried to explain to you that the appropriation is deducted on the pay roll, and it is a matter of debit and credit, and the money itself is not handled. That goes into the treasury of the company, into the treasurer's hands.

Q. That is a matter that the treasurer and his book keepers take care of, is it not?

A. I cannot answer your question in that way.

Q. You don't keep those books, do you?

A. I keep track of the money that is reported and turned into the treasury and drawn on it.

Q. Does this railroad company pay you personally, five cents personally out of this $81,000, $78,000, or $75,000?

A. My salary is part of that.

Q. Now this money that you say the railroad company paid to the department, did they pay it to you personally?

A. Yes, I get my salary from the railroad company.

Q. You understand perfectly what I mean: when you say this railroad contributed a certain fund to this department, that is a matter of book keeping within the treasurer's department?

603 A. Not at all.

Q. Did this railroad company or any of its officials, in cash or paper, or in any other way pay you or your department this money?

A. A part of it.

Q. What did they pay you?

A. My salary.

Q. You have stated that now three times. I am talking about this $78,000 and such like that you said the railroad company paid to the department. Did they pay it to you personally?

A. I didn't say they paid it to the department.

Q. You only know about that payment because the books of the treasurer show it, isn't that true?

A. No, because that $78,000 is disbursed under my direction.

Q. I am talking about the payment from the railroad company to the department. They don't pay you a dollar and you didn't see the railroad pay anybody else a dollar except your salary.

Mr. EVERETT: I object to that. He said it went through his hands.

Mr. MCSHANE: No, he didn't say anything of the kind. That is a matter of book keeping.

The COURT: He may answer.

Mr. EVERETT: Exception.

To which ruling of the court the defendant by its counsel then and there duly excepted.

Mr. McSHANE: Listen, Mr. Redfern, aside from your salary and those little things, and the $78,000 that the railroad paid to the department, they didn't pay it to you personally?

A. I didn't say that; they paid it to the department.

Q. What did you say?

A. I said paid to me and for the expenses of the department.

604 Q. It was simply a matter of book keeping in the treasurer's office?

A. Not at all.

Q. Do you keep any books on it?

A. That money is only paid out on my personal signature.

Q. The truth about the matter you don't know what the accounts were except as to the books of the treasurer?

Mr. EVERETT: I object to that. He has answered it.

The COURT: Let him answer again.

Mr. EVERETT: All right.

Mr. McSHANE:

Q. Isn't it a fact that the truth is you know you don't get that money, and that you have to look to the books of the treasurer for it, and from there you assume so much credit and so much debit, isn't that true?

A. That is not the truth about it.

Q. Do you keep the accounts yourself?

A. I keep the accounts myself.

Q. You know all of these things without any reference to the treasurer or anybody else?

Mr. EVERETT: I object to that.

Mr. McSHANE: How much did these men pay into the department in the year 1908?

A. The contributions of the members of the relief fund amounted to a little over $500,000 in the year 1908.

Q. That is the year that you said the railroad had paid something like $81,000?

A. Yes sir.

Mr. EVERETT: I object to the form of the question.

The COURT: He has answered.

Mr. EVERETT: I move that the answer be stricken out.

The COURT: It may stand.

Mr. EVERETT: Exception.

605 To which ruling of the court the defendant by its counsel then and there duly excepted.

Mr. McSHANE:

Q. How much did the men themselves pay into this fund in the year 1909?

Mr. EVERETT: I object as not proper cross examination.
The COURT: He may answer if he knows.
Mr. EVERETT: Exception.
To which ruling of the court the defendant by its counsel then and there duly excepted.

The WITNESS: I think it was about $540,000; that is within $5,000 of it, I guess.

Mr. MCSHANE:

Q. And in the year 1910, what did the men themselves put into this fund?

Mr. EVERETT: The same objection and the same ruling.
The COURT: Yes.
To which ruling of the court the defendant by its counsel then and there duly excepted.

Mr. MCSHANE:

Q. He asked how much the railroads paid and I want — know how much the men paid. If it is proper to show what the railroad paid it is proper to show what the men paid, I should think.
The COURT: Whether it is time to show it or not, that is all.
Mr. MCSHANE: Well, he showed half of it.
Mr. EVERETT: We are only trying to prove the half of our case, trying to prove the defense.
The COURT: I suspect that you will have to put it in another way.
Mr. MCSHANE: I will call him now, if necessary, as my own witness, for this one question.

Q. How much did the men pay in 1910?

Mr. EVERETT: I object to his entering his rebuttal at the time of cross examining a witness on defense.
606 The COURT: I will change my ruling. He may answer the question.
Mr. EVERETT: Exception.
To which ruling of the court the defendant by its counsel then and there duly excepted.

Mr. MCSHANE:

Q. How much did the men pay?
A. I think it was about $585,000. I may be off a few thousand. I may be off in some of these figures.
Q. Just one word further. About the way that you figured that the railroad paid into the relief department a certain amount of money, the way you figured that is because you O. K.'d all checks drawn by the relief department for certain sums of money, is that right?
A. I repeatedly said that the railroad did not pay that money into the relief fund, into the relief department; that money was paid on a pay roll approved by me, or vouchers approved by me which was a

direct draft on the treasurer of the railroad company to have his own moneys and the money did not flow into the fund at all.

Mr. McSHANE: That is all.

Q. Oh yes, will you please name the affiliated companies in this relief department, one is the Chicago *and* Burlington and Quincy Company, and which are the other affiliated companies?
A. Well, at the present time but one.
Q. What is it?
A. The Chicago, Burlington and Quincy Railroad Company.
Q. Well, in 1908, what was it? From 1902, just take it from there on down?
A. Well, we have had at different times, eight or nine companies. What is the date there?
Q. 1902, I think. July the 1st, 1902.
A. My recollection is that at that time the Chicago Burlington and Quincy Railway Company and the Chicago Burlington and Quincy Railroad Company.
607 Q. From that time on, what companies have been affiliated?
A. No others except the two I have mentioned.
Q. The Chicago and Alton Railroad Company is now an affiliated member of the relief department, is it not?

Mr. EVERETT: I object, not cross examination.
Mr. McSHANE: I think it is.
The COURT: Yes, you introduced something on it.
Mr. EVERETT: I did not.
The COURT: It is now in evidence, is it not?
Mr. McSHANE: What is that.
The COURT: It has been introduced in evidence, has it not?
Mr. McSHANE: Yes sir.
Mr. EVERETT: I think that shows for itself.
The COURT: Does it show for itself?
Mr. McSHANE: It doesn't show who the affiliated companies were.

Q. Were there any other affiliated companies since 1902 except those you have mentioned, the Chicago Burlington & Quincy Railroad Company and the Chicago, Burlington & Quincy Railway Company?

Mr. EVERETT: I object to that.
The COURT: Overruled.
Mr. EVERETT: Exception.
To which ruling of the court, the defendant by its counsel, then and there duly excepted.

Mr. McSHANE:

Q. Were they the only ones?
A. They were.

Mr. McSHANE: That is all.

Redirect examination.

By Mr. EVERETT:

Q. How much moneys in 1908, were paid out as benefits to the men out of that $545,000?

608 A. In 1908?

Q. Yes.

A. It is very hard to recall all of those figures.

Q. Well, about?

A. I think somewhere about $540,000.

Q. How much in 1909 was paid out in benefits to the men, the members of the relief department?

A. Somewhere about $575,000.

Q. How much was paid out in 1910 to the men who were members of the relief department, when you said $585,000 was paid in?

A. In the neighborhood of $650,000.

Mr. EVERETT: That is all.

Recross-examination.

By Mr. MCSHANE:

Q. By the way, the company paid the interest to the department, but they used the money that they paid interest to the department for, the company had the money, and paid the department the interest?

A. They paid interest on the balances it had in its hands.

Q. That is to say, the company like any other company paid the interest to the credit of the department, on the moneys that belonged to the department, that they had in their hands?

A. Yes, sir.

Mr. MCSHANE: That is all.

Mr. EVERETT: That is all, Mr. Redfern.

(Witness excused.)

GEORGE MCCOLLOM, called as a witness on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Everett and testified as follows:

Q. What is your name?

A. George McCollom.

Q. You are a witness who was on the stand several days ago?

A. Yes, sir.

609 Q. For the plaintiff?

A. Yes, sir.

Q. What work were you doing in 1908?

A. I was number grabber and a switch tender.

Q. How long had you been doing that work prior to December 15th, 1908?

A. I don't remember.

Q. About how long?

A. I have no way of knowing, I worked there three times. I have no way of remembering.

Q. Seven years?

A. About a year, approximately at that time.

Q. What?

A. About a year approximately at that time.

Q. At that time you were working near or at Grove street, weren't you?

A. Yes, sir.

Q. You are familiar with the Grove track there that connects with the Western Indiana main line, with the Pennsylvania main line, are you not?

A. Yes, sir.

Q. I show you a blue print which purports to be a drawing of the tracks at that place, do you know whether or not that correctly shows the situation of the tracks (showing witness blue prints)?

A. To the best of my knowledge it does.

Q. Looks like it, does it?

A. Yes.

Q. You see in the center of that blue print a red flag?

A. Yes, sir.

Q. Is this the curved track running along here that you have reference to (indicating)?

A. Yes, sir.

Q. We will mark this Exhibit 13, and mark that track at the place of the flag with the figure "1"? From the point where this track, curved track crosses the main track at point "2," is it
610 straight or not back towards the—that is southwest, isn't it?

A. Southwest on to the main tracks.

Q. Southwest?

A. Yes, sir.

Q. How far back from point "2" is that track straight?

Mr. McSHANE: Wait, he hasn't said it was straight.

Mr. EVERETT: Well, is it straight?

A. The track is straight from a certain point—from a point——

Mr. EVERETT: Let me have the photograph in question.

(Photograph handed counsel.)

Q. From what point is it straight, can you see it on the photograph better?

A. I can't tell much by that.

Q. Do you recognize Defendant's Exhibit B as a correct representation of the situation?

(Showing witness photograph.)

Q. From a point to the southwest, where you see the letter "C" on this Defendant's Exhibit D, is that track to the southwest straight or not?

A. Why, it is very near straight.

Q. For what distance?

A. From this point (indicating).

Q. From point "C" yes that you have your finger on, back here to the southwest?

A. Oh, I would say at a guess about 200 feet.

Q. Where does the curve of the track marked "B" on that exhibit begin, in reference to the semaphore pole that you see is marked with the letter "A" on top of it?

A. It starts right about this point, to the best of my recollection, along in here is the curve.

Mr. McSHANE: Now, you are indicating at the semaphore, aren't you, the point?

Mr. EVERETT: No, his finger went over the joint in the track here (indicating).

The WITNESS: Right about here (indicating).

611 Mr. EVERETT:

Q. Do you see the joint in the track here?

Mr. McSHANE: His finger indicates the pole.

The WITNESS: Right about here (indicating).

Mr. EVERETT:

Q. About where the joint is?

A. Yes.

Mr. McSHANE:

Q. Where the pole is?

A. Yes.

Q. That is where the curve commences?

Mr. EVERETT: I object to counsel taking up the examination at this time.

The COURT: Yes, one at a time.

Mr. EVERETT: I put the figure "3" at the point you indicated?

A. Yes, sir.

Q. And that is where the track begins to curve?

A. Yes, sir, to the best of my knowledge.

Q. Prior to December 15, 1908, how many cars on an average passed over that curved track, marked "B" on "Defendant's Exhibit B"; how many cars in that month?

A. I would say approximately 400.

Q. Did you ever know or hear of any switchman being injured or brushed off at the semaphore there, at that point?

A. Not as I know of.

Q. Do you know who operated, controlled and maintained the semaphore marked "A" on "Defendant's Exhibit B"?

Mr. McSHANE: That is a conclusion pure and simple; I have no objection to this man telling what he knows.

The COURT: If he knows, he can tell.

Mr. McSHANE: I object to it as a conclusion; he must answer that by a conclusion.

The COURT: A man's knowledge is not a conclusion, I wouldn't say.

612 Mr. McSHANE: I will say as to ownership or operation.

Mr. EVERETT: I didn't ask that.

The COURT: That is a matter of cross examination; you can determine on that later, and afterwards, if he knows, he can answer.

Mr. McSHANE: I except to it.

Mr. EVERETT:

Q. Do you know? Do you know who controlled, operated and maintained the semaphore marked "A" on "Defendant's Exhibit B"?

A. To the best of my knowledge the Chicago & Western Indiana.

Q. That is the Chicago & Western Indiana Railway?

A. Yes.

Q. Was that the general repute there at that place, among the employes?

Mr. McSHANE: I object.

The COURT: The objection will be sustained.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

The WITNESS: Why,——

Mr. McSHANE: Wait, please.

Mr. EVERETT: That is all.

Cross-examination.

By Mr. McSHANE:

Q. You never heard that Wagner was brushed off there, you just heard that some Burlington switchman got hurt in some way?

A. Yes, sir.

Q. You told us the other day that you just heard that a Burlington switchman had been hurt in some way?

613 Mr. EVERETT: I object, he just answered.

The COURT: Well, he can answer again.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

The WITNESS:

A. I knew that a man had had an injury there at that time, I did not know that his name was Wagner, I never personally had met the man.

Mr. McSHANE:

Q. But you heard that some Burlington switchman was hurt, I take it?

Mr. EVERETT: I object to that.

The COURT: Yes.

The WITNESS: Yes, I did.

Mr. MCSHANE:

Q. Now, Mr. McCollom, about this curved track—about the curve in the track, now, you say the track came down here, don't you?
A. Yes, sir.
Q. The curve—didn't you say there is a curve in the track clear over here, almost at the point where it joines the Pennsylvania?

Mr. EVERETT: I object to that.
The COURT: Objection sustained.

Mr. MCSHANE:

Q. Does it not look like it is shown on this blue print?

Mr. EVERETT: I object to that.
Mr. MCSHANE: Look closely at it.
The COURT: Objection overruled.
Mr. EVERETT: Exception.
To which ruling of the court, the defendant, by its counsel, then and there duly excepted.
614 Mr. EVERETT: He means does the track look like that?
Mr. MCSHANE: Yes.

Q. Doesn't the curve, or lack of curve occur about as shown on that blue print now shown you or this diagram——

Mr. EVERETT: Hasn't he been over that?
Mr. MCSHANE: It has "Chicago River" on the top of it.
Mr. EVERETT: That don't identify it.
Mr. MCSHANE: We will show it later.

The WITNESS:

A. My recollection of this track is that there is a curve up to a certain point, here and then from beyond that point on to the Fort Wayne tracks, is as near straight as I am.

Mr. MCSHANE:

Q. Doesn't it look like the track, the track that I show you there, doesn't it look like the track?

Mr. EVERETT: The witness has answered.
The COURT: He may answer again.

Mr. MCSHANE: Look at it closely and say if that doesn't in your judgment, represent the curve or absence of curve?
A. It looks like the track.
Q. Doesn't it correctly represent the degree of curve or the absence of curve?
A. I don't know.
Q. Doesn't it look like it?

Mr. EVERETT: If the court please, he has answered that.
The COURT: Yes, objection sustained.
Mr. MCSHANE: The point where the curve commences, as you

have put it, is it not down here on this first track that you pass over in leaving the Pennsylvania?

Mr. EVERETT: I object to the question, it goes to the question as it is embodied in reference to the drawing, and the witness says he cannot tell about the drawing.

615 Q. Does not the curve commence before this wide track strikes the other one of what are generally known as the Atchison, Topeka and Santa Fe tracks?

A. Doesn't it curve before that?

Q. Doesn't it commence about there (indicating), the back part of the curve?

A. Why, not to my recollection, it doesn't. Back in about the "Y," it seems to me though it is straight from that point on up to the connection with the Fort Wayne tracks.

Q. When did you see the track last?

Mr. EVERETT: That point he indicated is where the semaphore is.

Mr. MCSHANE:

Q. When did you see the track last?

A. I don't know exactly, the last week or so.

Q. Did you ever notice it, as to where the curve commences, and where it didn't commence?

A. Well, from my recollection of it, that is all.

Q. Isn't it true that that diagram I show you here, shows it absolutely correct?

Mr. EVERETT: I object; the witness says he cannot state.

Mr. MCSHANE:

Q. You either know or you don't know; does that show it absolutely correct?

A. I don't know.

Q. You don't say that doesn't show it correctly?

A. No sir.

Q. By that I refer—mark that please. This thing I have referred to has been marked "Plaintiff's Exhibit B for identification, and has been referred to in the record, and may be offered later.

Mr. MCSHANE: That is all.

616 R. W. BOND, called as a witness on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Everett, and testified as follows:

Q. What is your name?

A. R. W. Bond.

Q. And what is your business?

A. I am employed by the Chicago, Burlington & Quincy Railroad.

Q. How long have you been with them?

A. I have been employed by them for 23 years, about 23 years.

Q. In what capacity?

A. Well, I have worked for the last ten years as a sort of an investigator.
Q. Investigator?
A. Yes sir.
Q. Investigating the causes of accidents?
A. Yes sir.
Q. And getting reports?
A. Yes sir.
Q. Do you know Wagner, the plaintiff in this case?
A. Yes sir, I do.
Q. How long have you known him?
A. I have known Joe Wagner 18 or 20 years; 18 or 20 years altogether.
Q. You call him Joe and you call him Bob?
A. Yes sir.
Q. Did you have occasion to call on him January 5th, 1909?
A. I called upon him about that time.
Q. I show you Defendants' Exhibit 9 and ask you if you have ever seen that before. (Showing witness praper)?
A. When I put on my headlights (referring to spectacles), I can tell, yes sir.
Q. In whose handwriting is the body of that report, that document?
617 A. My handwriting.
Q. Whose signature is attached to it?
A. That is Mr. Wagner's signature.
Q. In whose handwriting is the date, January 5th, 1909, at the bottom of the page?
A. Mr. Wagner's.
Q. Was that signed in your presence?
A. Yes sir.
Q. By him?
A. Yes sir.
Q. Where was he at the time?
A. He was at St. Anthony's Hospital.
Q. In bed?
A. Yes sir.
Q. For what purpose did you go there?
A. I went there to procure a statement if he was well enough to give it.
Q. Did you tell him what your purpose was in calling on him?
A. Yes sir.
Q. Now tell what occurred; what was said at that time by you and by Wagner.

Mr. McSHANE: I object unless there are some apparent contradictions.

Mr. EVERETT: If the court please, I am attempting to prove that this statement was taken freely and voluntarily by the words of the plaintiff made at the time. I am asking the general questions.

The COURT: Objection sustained as to the contradiction, that would not be competent.

Mr. EVERETT: I anticipate—if they put on evidence to prove this was taken by coercion, I wouldn't have the opportunity to bring on any more witnesses.

618 Mr. McSHANE: I don't think there is any claim of that kind.

Mr. EVERETT: I don't know, but I have the right to show what occurred there at that time and to show that the statement was freely and voluntarily made.

The COURT: Certainly, and you have the right to introduce that testimony showing that fact, but as to all the conversation, you have not the right.

Mr. EVERETT: Exception to the ruling.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Q. What conversation did you have in reference to his accident, and in reference to the first reference as to what object was on your visit there?

Mr. McSHANE: I object to that, he already said he went to get a statement.

The COURT: He may answer again.

Mr. EVERETT:

Q. What did you tell Mr. Wagner?

A. I went to see Mr. Wagner and asked if he was strong enough to make a statement. He told me he would tell me what occurred, and I wrote it down and he signed it.

Q. Then what did he do?

A. Then he signed it in my presence.

Q. Where did you get the information that you have written on this statement?

A. I got it from Mr. Wagner.

Q. Where did you get this information, and how did you get it where you wrote down the words "to go back to the Erie yards at 51st street, and I was struck by a semaphore post on Western Indiana tracks?"

619 A. Mr. Wagner told me that was the way he was hurt.

Q. Prior to your going there, did you have any knowledge of how and where he was hurt?

A. I didn't know anything about it until he told me how he got hurt*ed*.

Q. He told you that, did he?

A. Yes sir.

Q. Did he give you the information that is contained in the balance of the statement?

A. Yes sir.

Q. Where you filled out the blank spaces?

A. Yes sir, after I finished I handed it to him and he signed it and he handed it back to me.

Q. What was said then, if anything?

A. I asked him how he was feeling and he said pretty bad, I stayed a few minutes with him and then I came away.

Q. What was said with reference to any objection to the statement you have written out here?

A. He didn't make any objection.

Q. How long did he hold it in his hand before handing it back?

A. He was lying on his back in bed, and he took and read it over and then he signed it.

Q. Did he also write the word "switchman" on this exhibit? (Showing witness paper.)

A. Yes sir.

Q. At that time did you offer him any inducement of any kind whatever, to sign this statement?

A. No sir.

Q. Made no threats?

A. No sir.

Q. Of discharge of any kind against them?

620 A. No, I think not.

Q. Did anything occur there further than what you have related?

A. That is all he would tell.

Q. He handed you the statement and you walked off with it.

A. Yes sir.

Mr. EVERETT: That is all.

Cross-examination.

By Mr. MCSHANE:

Q. Mr. Bond?

A. Yes sir.

Q. Aren't you a little bit mistaken about not having heard of the accident before?

A. Why, yes, we had heard of the accident but I didn't know just the particulars how it occurred.

Mr. MCSHANE:

Q. Didn't you take the statements of the other men?

A. No, that is the only statement I got. The other men sent their statements in.

Q. You knew in a general way about it when you went there.

A. I had heard how he got hurt, and I went over there to see Joe and he told me exactly how the thing occurred, I thought he would know more about it than anybody else.

Q. Mr. Bond, about this statement in here that is in which, as I understand it, he said "I was struck by the semaphore post on the Western Indiana Avenue tracks; did he tell you how he found out, or who told him that it was the Western Indiana tracks?

A. No sir, he did not tell me anything about it.

621 Q. I supposed you didn't know.

—. He said, your Honor, he meant the Western Indiana tracks.

Mr. EVERETT: I object.
The COURT: Objection sustained.

Mr. MCSHANE:

Q. It was commenced against the Western Indiana Railroad Company, that was his information; that is all, Mr. Bond. This is a new suit. It was commenced before we found out who owned it, and then we changed.

Mr. EVERETT: Note an exception to the remarks of counsel.

(Witness excused.)

FREDERICK BERBER, called as a witness on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Everett, and testified as follows:

Q. What is your name?
A. Frederick Berber.
Q. What is your business?
A. Car Inspector.
Q. For what company?
A. C. B. & Q.
Q. How long have you been car inspector for the C. B. & Q.?
A. About 14 years.
Q. As car inspector, what are your duties?
A. To look over all cars coming in and going out.
Q. Passenger and freight?
A. Passenger.
Q. Does that include baggage cars?
A. Yes sir.
Q. Were you doing that on December 15th, 1908?
A. Yes sir, I was working on that day.
Q. Do you keep any records of cars?
A. Yes sir.
Q. That passed your inspection that day?
A. We kept train records and regular records also.
622 Q. Have you the record with you?
A. Yes sir.
Q. Will you turn to it.

(Witness does so.)

A. Here is our train record for December 15th.
Q. In whose handwriting is that kept?
A. My own.
Q. Were those entries on there made at the time they were purported to be made?
A. Made the same day.
Q. Made the same day?
A. Yes sir.
Q. In the ordinary course of your business?
A. Yes sir.

Q. And the first entry that was made by you of the condition of the cars that passed your inspection, is that it?
A. Yes sir.
Q. On December 15th, 1908, in inspecting a car, a baggage car what do you look for?
A. Looked to see if the car is in safe condition to run.
Q. What more specifically do you look for?
A. To look at the cars, to get on to the safety devices and see that everything is in good shape.
Q. Did you made any inspection at that time of baggage cars or hand holds or stirrups?
A. Yes sir.
Q. State what you did in that regard?
A. I looked the cars over all around, to see that the handles and steps and everything was in good shape, and looked to see——
Q. Have you a record of the inspecting of five baggage cars on that date, December 15th?
623 A. Yes sir. I handled five Great Northern Baggage cars on that date.
Q. Give the initial and number?
A. 1650, Great Northern, 1003, 1655, 1664 and 1617.
Mr. McSHANE: All Great Northern?
A. All Great Northern cars.

Mr. EVERETT:

Q. What is the first one you have there?
A. 1650.
Q. What train did they come in on?
A. Three of the cars came on train 15, and 2 cars on train 48.
Q. Are you able to state now whether or not those five baggage cars had a step and hand hold on the forward end, on the ends.

Mr. McSHANE: Are you asking generally from the records, or independent recollection.
Mr. EVERETT: Independent recollection.

The WITNESS:

A. That is my recollection, my recollection is that they had steps on the ends of the cars.

Mr. EVERETT:

Q. If they had not had steps on what would have been done?
A. I would have made a report of it or a note of it.
Q. Does your record, that you have there, of the inspection of that car show there was no steps on the end of the cars?
A. No sir, it don't.

Mr. EVERETT: Let me see your record.
Mr. McSHANE: Read all that his record shows about it..

Mr. EVERETT:

Q. Is this one of the cars that came in at that time?

A. When they came in I simply took the seal numbers, if anything else wrong there we mark it down.

Mr. McSHANE: Let him read the whole business.

624 Mr. EVERETT: All right.

Q. Read what your book shows in reference to these five cars, every notice that you have made about it.

Mr. McSHANE: Just state it as it is there now.

The WITNESS:

A. 1655, Great Northern, baggage cars seal number 881114, 881115, 881111, 881112.

Mr. McSHANE: Those are the seal numbers?

A. Yes sir, those are the seal numbers, the cars are loaded and sealed up.

Mr. EVERETT:

Q. What is the next car?

A. 1003, seal number 881100.

Q. What is the next car?

A. 1050, seal number 881108 and 881107, and the other two cars there were no seal numbers; and that don't show.

Q. Have you the numbers of the cars there?

A. Yes sir, I have the numbers of the cars.

Mr. McSHANE:

Q. What does that show?

A. That don't show anything.

Q. You have some idea about it?

A. No sir, I don't remember those two in here.

Mr. EVERETT:

Q. You have them in another record?

A. Yes.

Mr. EVERETT: Show Mr. McShane that one.

Mr. McSHANE: I want to know if that is all that you have of the other two, is that right?

Mr. EVERETT: Yes.

Mr. McSHANE: Read the whole business.

The WITNESS: Those cars were there, and that is all there is to it.

Mr. EVERETT:

Q. That is what you have given?

A. Yes.

625 Q. Just the number and initial of the car?

A. That is all; that shows we handled the cars.

Q. In the usual course of business if there had been any hand holds absent from these cars or any steps absent from the cars wouldn't that be shown?

A. I might have held out the cars or made repairs.

Q. In reference to making a record, what would be done?

A. Let the cars go and make a record.
Q. Where did you make the record?
A. Right in this book here.
Q. In the record book?
A. Yes.
Q. Is there any other record in that book other than what you have stated?
A. No sir, that is all.
Q. That is a complete record?
A. That is a complete record, yes.
Q. Was it part of your duty to examine particularly every hand hold and step?
A. Well, it is my duty to examine the whole car, the outside of the car.
Q. Your examination is controlled by the interstate commerce rules, isn't it?
A. Yes.
Q. And you knew these rules in regard to the steps and hand holds?
A. Yes sir.
Q. Did you examine for that particular thing?
A. Yes sir, we always do.

Mr. EVERETT: That is all, take the witness.

626 Cross-examination.

By Mr. MCSHANE:

Q. Turn back in each of your books to where those entries are.
(Witness does so.)
Q. Now turn to the other one.
(Witness does so.)
Q. The interstate commerce requirements require that there should be grab irons on the end of every car?
A. Yes sir.
Q. For the greater security of the switchmen in coupling and uncoupling?
A. Yes sir.
Q. That means that on each side of the draw bar in the body of the car, there should be a grab iron like the handle on a freight car?
A. Yes.
Q. And that is what you mean, if the car has this grab-iron, it is all right?
A. There must be a step.
Q. Isn't there a regulation now about having steps, under the Interstate Commerce rules?
A. In a baggage car? In every one you have to have a step at the corner to get on.
Q. To go on where?
A. In to the end of the car.
Q. Was there a door on the end of the car, do you know?

A. Yes, sir.
Q. Do you remember that?
A. Yes, sir.
Q. Have you any record of it?
A. No.
627 Q. You have seen blind cars, have you not?
A. Not very many.
Q. You have seen them, however?
A. I have seen them, yes.
Q. You think there were doors on all these cars, or don't you remember?
A. I don't remember.
Q. Now, a hand-hold, you wouldn't stop a through car, a car in bond, if it had a grab-iron, because it didn't have a step, would you?
A. Well, I would put it on before I would let it go.
Q. Now, take the photograph, showing the grab-iron on the sill of the car, the law requires it there, doesn't it?
A. Yes, sir.
Q. Now, where has the step to be?
A. The step has to be on the corner post, the end of the car.
Q. Under the grab-iron?
A. Yes, sir.
Q. The grab-iron, is on the sill, isn't it?
A. Yes, sir, on the end sill, but the step is supposed to be on the corner, the corner post.
Q. Below the grab-iron?
A. Yes, sir.
Q. What kind of a step?
A. Why, a small step, about 12 inches.

The COURT: We will suspend here.
Gentlemen of the jury, you will observe the instructions heretofore given you by the court, and meet the court here at 2 o'clock sharp.
Whereupon court adjourned until 2 o'clock P. M. same day, May 18, 1911.

628 THURSDAY, May 18, 1910.—2 o'clock p. m.

Court met pursuant to adjournment.
Present same as before.

FREDERICK BERBER, called as a witness on behalf of the defendant, having been previously sworn, resumed the stand for further cross-examination by Mr. McShane, and testified as follows:

Q. Turn to the entry that you have of the receipt of these cars, or any of them, turn to the entry in your book where it shows that you received the cars, what train they came on, or something of that kind?
A. Three cars came on Number 59 and two cars came on Number 48 on December 15th, 1908.
Q. I want to know what cars came on what particular trains?

The COURT: Don't talk quite so fast. You have a broken accent and we cannot understand you.

Mr. MCSHANE:

Q. Which train did the different cars come on?
A. Number 1650, Number 1003, and number 1653 came in on Number 50.
Q. What is Number 50?
A. 50 is the through train from the coast.

Mr. EVERETT: I object to that.
Mr. MCSHANE: I have a right to know what he is talking about.
The COURT: Overruled.
Mr. EVERETT: That is entirely immaterial in this case.
629 The COURT: Overruled.
Mr. EVERETT: Exception.
To which ruling of the court the defendant by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. What cars were in the other train?
A. The other two cars came in on the other train on number 48.
Q. What is number 48?

Mr. EVERETT: I object, that is immaterial.
The COURT: He may answer, you went into that.
Mr. EVERETT: Exception.
To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. What is number 48?
A. 48 is the train from Minneapolis to Chicago.
Q. You speak of the Great Northern; is that the Great Northern Express or Great Northern Railroad Company? The cars, were they Great Northern Railroad cars or Great Northern Express cars?
A. Well, they were baggage cars, express cars.
Q. Well, I know, but is it the Great Northern Express—there is a Northern Pacific Express—is there a Great Northern Express Company? What I want to know is, were those cars Great Northern Railroad cars, is that what you mean?
A. They were Great Northern Railroad cars, the name was on the car, Great Northern Railroad.
Q. That is what I want to know. Have you seen many of those Great Northern Express cars, Great Northern Railroad Express cars?
630 A. Yes sir, we get them in there occasionally, not every day though.
Q. How often do you get them in there?
A. Oh, we get a shipment of silk, probably five or six or seven times a month.
Q. Were you ever on the Great Northern?

A. No sir, I was not.
Q. Do you know where it is?
A. No sir, I did not.
Q. Well, you know it runs from the Coast to Minneapolis?

Mr. EVERETT: Wait a minute, I object to that.

Mr. MCSHANE: I think that is proper. We want to show whether or not—what he knows about the cars, whether he was ever on the road—his familiarity and all that.

Mr. EVERETT: He just said he took the initials off the car.

Mr. MCSHANE: I have a right to know.

The COURT: Well, you have inquired about the train, Mr. Everett.

Mr. MCSHANE: Yes, he did.

The COURT: He may answer that question.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. Where does the Great Northern Road run?
A. Runs from St. Paul out to the Coast.
Q. And they connect with the Burlington at St. Paul, is that right?
A. Yes sir, as far as I know they do.
Q. You spoke about seals; which cars had seals, look at your book and tell us what seals you saw on the cars?

631 Mr. EVERETT: I object to that, he gave it this morning.
The COURT: Overruled.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. What seals were on the cars?
A. Why 1655 had four seals on it.
Q. What kind of seals, describe them?
A. Why Great Northern Railroad seals.
Q. What do you mean by that?
A. Why, Great Northern, the name Great Northern and the number of the seal is stamped right on the seal.
Q. In the lead, something of that kind?
A. No sir, no lead.
Q. Does the Burlington have seals, too?
A. No sir.
Q. Different seals are they?
A. Yes sir, they are some different.
Q. Cars loaded on the Burlington were stamped with the Burlington seal and the ones loaded on the Great Northern were stamped with the Great Northern seal, is that right?
A. Yes sir.
Q. Did all those cars have Great Northern seals?

A. Yes sir.
Q. Indicating that they came from the Great Northern road?
A. Yes sir.

Mr. EVERETT: I object to that.
The COURT: Objection sustained.

Mr. MCSHANE:

Q. Did you ever know of the Burlington putting on a Great Northern seal?
632 A. No sir, we have not got them.
Q. Now, you have no record at all about the hand-holds or grab-irons or stirrups about those cars at all, have you?
A. No sir, no record of them, no sir.
Q. You merely say you think if you found anything wrong it was your duty to note it.
A. Yes sir.
Q. You made no note of it?
A. No sir.

Mr. MCSHANE: That is all.
Mr. EVERETT: That is all.
(Witness excused.)

HENRY YOERG, called as a witness on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Everett, and testified as follows:
Q. What is your name?
A. Henry Yoerg.
Q. Where do you live?
A. St. Paul.
Q. Minnesota?
A. Minnesota, yes sir.
Q. You came down here on a telegraphic advice last night, did you?
A. Yes sir.
Q. What is your business?
A. Mechanical engineer of the Great Northern Railway.
Q. How long have you occupied that position?
A. Since November 15th, 1908.
Q. What education and experience have you had to fit yourself as a mechanical engineer?
A. I am a graduate of the Institute of Technology of Boston, and I started with the Great Northern in 1897. I had charge of
633 the Great Northern shops at St. Paul, their passenger car repair shop and locomotive shops, from 1901——
Q. How long were you there?
A. I was there from 1901 to 1908.
Q. After that what experience have you had?
A. Well, in 1908, from 1908 up to the present time I have had charge of all new work, such as construction of new cars, new locomotives and all rolling equipment.

Q. Have you the drawings and blue prints of the baggage cars of the Great Northern Railroad Company, have you the blue prints?
A. Yes sir, I have the blue prints.
Q. I show you a blue print purporting to be a blue print of baggage and express cars number 1650, 1651, 1653, 1656, 1658, 1664, 1669 and 1672, and ask you if you recognize that as a blue print of those cars?
A. Yes sir, I do.
Q. Is it correct?
A. Yes sir.
Q. And a correct description and drawing of the cars enumerated at the top of this blue print?
A. Yes sir.

Mr. EVERETT: We offer the blue print in evidence as Defendant's Exhibit 14.
Mr. MCSHANE: Probably won't be after I cross examine—are you through?
Mr. EVERETT: Well——
The COURT: I am not aware of your practice here. In the courts in which I practice we do not offer anything in evidence until after the cross examination. If it is the practice here it cuts no figure.
Mr. MCSHANE: No, we offer here at the time usually. The courts——
634 Mr. EVERETT: The court permits a preliminary examination, if that is what he wants, on that one subject.
Mr. MCSHANE: No, go ahead.
The COURT: I want to conform to the practice.
Mr. EVERETT: That is our practice.
The COURT: Well, whatever is your practice, you will proceed according to.
Mr. MCSHANE: Our practice as I understand it——
Mr. EVERETT: In this case it makes no difference because that is all I am going to ask the witness, so that he can go ahead with his cross examination.

Cross-examination.

By Mr. MCSHANE:

Q. You are now over the entire road, Mr. Yoerg?
A. Yes sir.
Q. Running from where to where?
A. Runs from St. Paul to the Pacific Coast.
Q. Any other place?
A. Sir?
Q. Branches out west there?
A. Oh, yes quite a few branches.
Q. Does it come through Illinois at all?
A. No sir.
Q. You connect at St. Paul with the Burlington?
A. Yes, it connects with the Burlington there.
Q. At St. Paul?

A. At St. Paul, yes sir.
Q. Did you have those blue prints made. Did you have this blue print made?
A. Well, that print is made for our records.

Mr. McSHANE: Where did you find the numbers of the cars, Mr. Everett?
635 Mr. EVERETT: Right here (indicating).
Mr. McSHANE: Oh, yes, I see. There is only one of these cars in our bunch.
Mr. EVERETT: No, there are several, 1664 is there.
Mr. McSHANE: 64 is here. What other one? That is the only one, I guess, of our cars.
Mr. EVERETT: Well, that is the one that that he was on, 1664 is the one that he was on.

Mr. McSHANE: You have different kinds of cars, I imagine?
A. Yes sir.
Q. Have you 1665?
A. Yes sir.
Q. You got it there?
A. Yes sir, I have.
Q. Let me see it, please?

(Witness hands blue print to counsel.)

Q. Now have you also 1617 and 1650 and 1003?
A. I think they are all in that bunch.
Q. Will you kindly just turn to them as quickly as you can.
A. You will have to repeat those numbers.
A. 1617.
Mr. EVERETT: Which one are you calling for?
A. 1617.
Mr. McSHANE: 1617.

Mr. EVERETT: I object to that as immaterial. There is no contention that he was on that car.
Mr. McSHANE: We do not know what car he was on.
Mr. EVERETT: The record has shown already that he was on 1664.
Mr. McSHANE: Two or three people guessed at what car he was on; he did not know.
636 Mr. EVERETT: The statements show that was the car; they have all testified to it.
Mr. McSHANE: I do not think it is important but you have asked about it.
Mr. EVERETT: Then if you do not think it is important I would not ask it.
Mr. McSHANE: There is some question about riding between the cars, that is all involved.
The COURT: He is merely asked if he has them. What he wants to do with them I don't know. He has the right to ask that question.

Mr. McSHANE: Have you a 1003?

A. Yes sir, here is 1003.
Q. Have you 1650?

Mr. EVERETT: Isn't 1650 one that you hold there, isn't that one of the numbers?
Mr. MCSHANE: Yes, you are right.
Mr. EVERETT: He has it there, Mr. Yoerg.
Mr. MCSHANE: I have it here.

Q. Now this brake on the end of the car, the wheel is not horizontal, it is perpendicular, is it not, as shown here (indicating on blue print)?
A. Well, the brake is really perpendicular, that is, to the car.

Mr. EVERETT: Mr. Yoerg please talk so the last juror can hear you.

Mr. MCSHANE:

Q. The wheel is perpendicular. I thought possibly it was turned this way (indicating), it is turned, it is perpendicular to the side of the car?
A. Yes sir.
637 Q. Just as it is shown on the cut?
A. Yes sir, it is.
Q. What is the ledge? I presume it is shown here—what is the ledge that sticks out the edge of the car?
A. That is what we call a buffer beam, that is seven and one-half inches from the outside of the sheeting to the outside of the beam.
Q. At what point?
A. Well, it is right in the——
Q. Doesn't this show (handing photograph to witness)?
Mr. EVERETT: What did he say, sheeting?
A. From the outside of the outside sheeting to the outside of the buffer beam.
Mr. EVERETT: The sheeting is the outside of the car?
A. Yes. Seven and one-half inches.
Mr. MCSHANE: Well, is it the same width all the way across?
A. Well, it varies, about one and one-half inches.
Q. Look at this part of it, what is this (indicating)?
A. That is the plan of the car.
Q. Now this buffer beam was here in the light line?
A. Yes sir, the buffer beam is the outside line.
Q. Where is the seven and one-half inches?
A. Right here.
Q. Seven and a half right at the outside edge of the buffer?
A. Yes.
Q. What is it at the extreme, near the corner of the car?
A. It is about five inches.
Q. What is the distance from the outer edge of the buffer
638 to the side of the car?
A. Why, about three inches.
Q. So that as these cars stand on a curve the corners of the cars are within what distance of each other?

A. Well, do you mean—I don't quite understand you.
Q. As two of these cars couple together, two of that type, in standing on a curve, on the inside of the curve, how close—a sharp curve—how close do the edges of the cars come?

Mr. EVERETT: I object to that question because——
The COURT: The objection will be sustained.

Mr. McSHANE:

Q. Taking that car and another just like it that is shown in the plan here—well, I guess we can figure that out—when a car is on a curve, when the car is on the curve, the inside of the car, the body of the car on the inside of the — is closer than the outside——
A. Yes sir.
Q. Can you tell us off-hand, or any way that you want to, with an ordinary curve as to what the space is between the edges, that is between the nearest points of the ends of the car to each other, in an ordinary curve, on the inside of the curve.

Mr. EVERETT: I object to the question. It is the same thing the court has ruled on.

Mr. McSHANE:

Q. With those cars.

The COURT: Objection sustained.
Mr. McSHANE: That is all.
Mr. EVERETT: We now offer the blue print in evidence, if the court please.
The COURT: Any objection. Have you any objection, Mr. McShane?
639 Mr. McSHANE: I have no objection.
The COURT: It may go in.
Mr. EVERETT: Mr. Reporter, will you mark the blue print Defendants' Exhibit 14, mark it Defendants' Exhibit 14, Mr. Reporter.
Which said blue print last above referred to, being offered and admitted in evidence, being marked by the Reporter, Defendants' Exhibit 14, is returned herewith on the following page of this Bill of Exceptions.

Mr. McSHANE: Let me ask just one question, Mr. Yoerg.
Q. These end buffers or this projection, is narrower at the end of the car so as to permit the car to go around a curve.

Mr. EVERETT: I object to that.
The COURT: The objection will be overruled.
Mr. EVERETT: Exception.
To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. McSHANE:

Q. Isn't that so?
A. No sir.

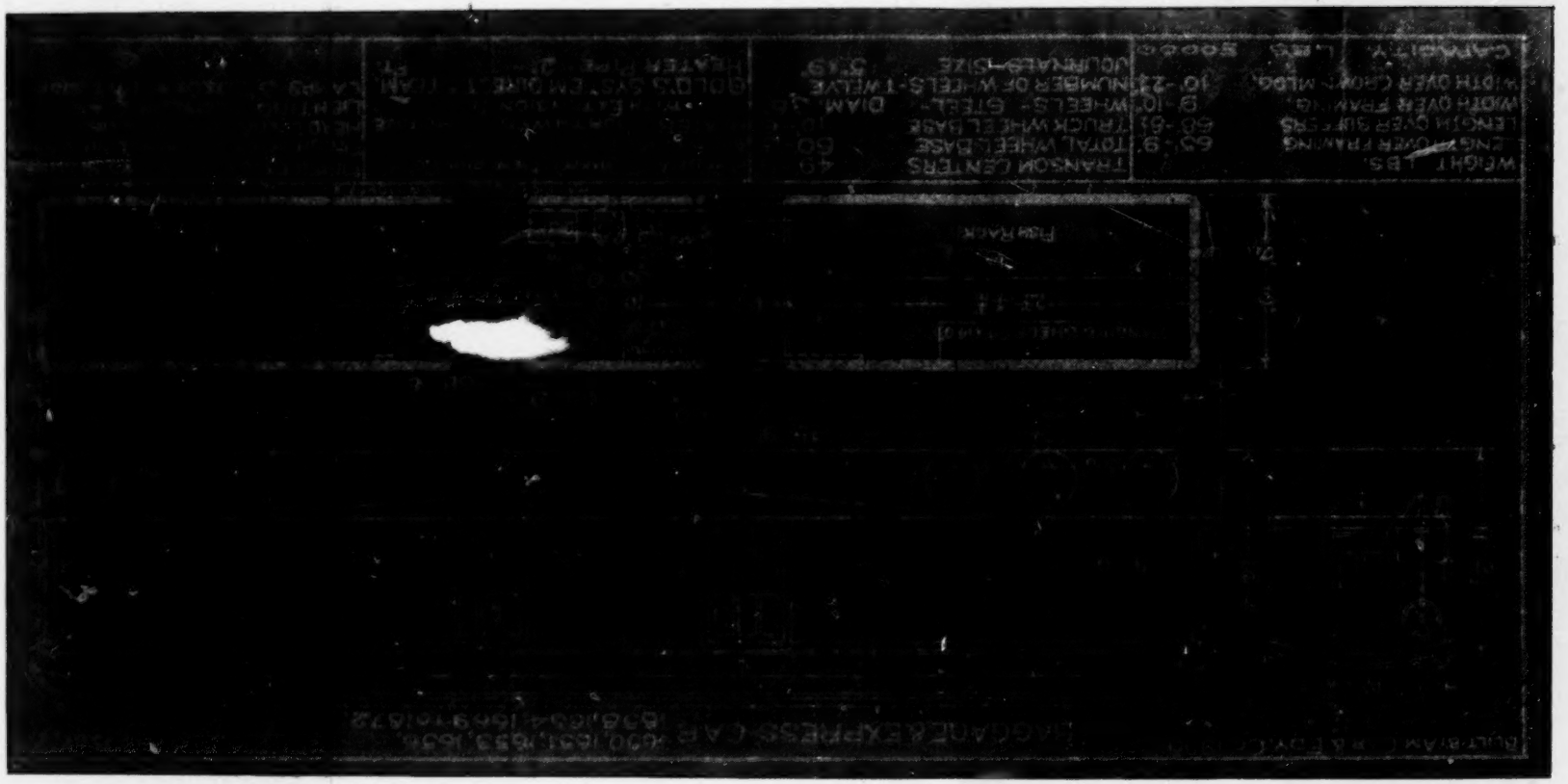
Q. What is the purpose of having more space—of having the ledge or projection at the end of the car narrower at the outer edge than it is in the center?

A. That buffer is put on there for two reasons: One is for the switchmen in switching cars to stand on; and second for strength of the car.

Q. I asked you what was the purpose of having it narrower at the outer edge of the car than in the center of the car?

(Here follows photograph marked page 640.)

Defendants Exhibit "14"



641 A. Well, you don't require the strength at the end of the car as you do in the center of the car.

Q. Does it come up flush with the other car, clear up to the edge—the two buffers don't touch on the outer edge?

A. No sir.

Q. They don't on a straight track but don't they come pretty close to each other on a curve?

A. No sir.

Q. They do not?

A. No sir.

Q. Standing the same distance apart on a curve?

A. No, they do not.

Q. No, of course they do not. That is all.

Mr. EVERETT: I might say this Defendant's Exhibit 14 is the one that was previously identified as Defendant's Exhibit E.

(Witness excused.)

Mr. EVERETT: Doctor Bassoe.

Doctor PETER BASSOE, called as a witness on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Everett, and testified as follows:

Q. What is your name?

A. Peter Bassoe.

Q. What is your profession, doctor?

A. I am a physician.

Q. Licensed to practice in the State of Illinois?

A. Yes.

642 Q. What experience did you have in an educational way prior to your becoming a physician.

A. I studied medicine at the College of Physicians & Surgeons here in Chicago.

Q. What year did you graduate?

A. In 1897.

Q. Have you had experience since that time in any colleges or associated with any hospitals?

A. Well, I have been associated with hospitals ever since.

Q. What hospital, and name what your position is in the hospital?

A. At the present time?

Q. Your experience which you have had, cover that?

A. Well, first I was interne in Cook County Hospital. First I was physician to an Insane Asylum at Mount Pleasant, Iowa for two years. Then in Europe for a year taking up nervous and mental diseases.

Q. Talk louder, doctor, so the last juror can hear you.

A. Then I was at another Insane Hospital in Massachusetts for half a year. The last nine years I have been in Chicago, connected—at first I was resident Pathologist at the Presbyterian Hospital for five years, and teaching in Rush Medical College, which I am still doing, and the last four years——

Q. What subject do you teach?

A. Nervous and mental diseases. The last four years I devoted

to practice and to teaching, and am attending physician in nervous diseases at the Presbyterian Hospital and the County Hospital, and some smaller hospitals, German Hospital and Swedish Hospital on the North Side.

Q. Have you specialized, doctor?

A. Yes sir.

643 Q. What branch?

A. Nervous and mental diseases.

Q. Do you know the plaintiff in this case sitting back here, Mr. Wagner?

A. Yes, I have seen him twice or three times.

Q. Did you make an examination of him?

A. Yes.

Q. How did he happen to come to you?

A. He was sent to me by Mr. Bevin.

Q. For what purpose?

A. With the request of getting an examination with special reference to his nervous system.

Q. You are not connected in any way with the Burlington Railway or the Chicago & Alton Railway Company, are you?

A. No.

Q. When did you examine him last?

A. The last time was, it was in March.

Q. 1911?

A. Yes, both the first and last time.

Q. What examination did you make of him?

A. Well, I made a complete examination of him.

Q. Take off his clothes?

A. Yes, I had him take off all his clothing.

Q. Was it at your office?

A. Yes.

Q. Now tell us just what you did in making the examination?

A. Well, in the first place I got him to tell me, give a full account of what had happened to him, and I asked him all the things that he complained of at the time, asked him to enumerate everything that he could think of at that time, that bother- him at the time. And after that I examined him, gave him a general examination with a special reference to find out if there could be any organic lesion of the nervous system, any pressure or laceration or

644 tearing of any nerves, or any part of the nervous system, because the problem as I saw it was to determine whether he was suffering from any local disturbance of the nervous system or whether he was suffering from general nervous disturbance.

Q. Did you find any organic nervous affection?

A. No, I could not detect any.

Q. What test did you make?

A. I examined his reflexes and tested his strength of the various muscular movements and went over his sensation to pain, to touch, light touches with cotton, and touches with pin point and pin heads, and with heat and cold, I think I did also.

Q. Are those the usual tests made by physicians to ascertain whether or not there is impairment of the nervous system?

A. Yes.

Q. What was the result of your tests?

A. Well, I could not find any evidence of any local lesion. So far as I could find there was no localized paralysis or anesthesia anywhere.

Q. His condition so far as his reflexes showed was normal, is that right?

A. Yes sir.

Q. Did you give him advice?

A. Yes, I gave him some advice.

Q. What advice did you give him?

A. I advised him to try and overcome his sensitiveness by having massage first of all, I thought that was the best way to begin it, and try to use his muscles and try to stand the pain. I told him that he would gradually be able to do more without, without pain;

645 and I also, I believe I told him, at least that was my conviction at the time that it would be best for him to get the legal aspect of his case cleared up as soon as possible.

Q. Why did you tell him to get the pending cases of his cleared up?

A. Well, because I felt that having a case on his mind all the time that he naturally would be dwelling on his symptoms and sufferings as long as he was constantly being asked questions about it, and knowing that his case was coming up he would naturally unconsciously dwell on it all the time.

Q. Have you an opinion as to whether or not when these cases are disposed of, no matter which way they go, whether his condition will improve?

A. Yes, very frequently there is a marked improvements, very rapidly.

Q. Have you an opinion as to whether he is able to do work now?

A. Well, I have not seen him since. I think it was about the last week in March; at that time I should say he would have been able to do some light work.

Q. That is, he can do any kind of work that did not require——

Mr. McSHANE: I object to leading him. He is quite capable to tell without suggestions.

Mr. EVERETT: You are of the opinion he could do any kind of work that did not require extra physical exertion, is that it?

Mr. McSHANE: I object to that.

The COURT: The objection will be sustained.

Mr. EVERETT: Exception.

646 To which ruling of the court the defendant, by its counsel, then and there duly expected.

Mr. EVERETT:

Q. What kind of work do you think he could do at the present time?

A. Work that would not require him to walk very long distances

at once stretch; or I should think heavy lifting would be particularly troublesome for him. But work where he could sit down and walk alternately and not have to do heavy lifting, I would say. I did not, I was not—he did not ask me about that phase of it and I did not take it up.

Q. From your examination of him did you find anything from a physical standpoint that would interfere with sexual intercourse?

A. No, not in a gross way, no.

Mr. McSHANE: What is that?

A. I did not find any evidence of any gross lesion of the nervous system that would interfere with that.

Mr. EVERETT:

Q. Unless there is——

Mr. McSHANE: I object to the suggestion, let him tell.

Mr. EVERETT: Will you let me finish my question. You wear me out by objecting and saying, wait, wait, wait.

Mr. McSHANE: I object to that, practically telling him what you want in your question.

Mr. EVERETT: Well, I have not formed the question yet.

Mr. McSHANE: Well, it is a very bad start.

Mr. EVERETT: Read the question as far as I have got.

(Question read.)

Mr. EVERETT:

Q. (continued). Unless there is some impairment of the
647 nerves controlling the sexual functions, you know of any reason or have you an opinion why there should be an impairment of that function?

A. Why, we frequently have impairment of the function in a general state of nervous exhaustion, or when there has been any suggestion brought to bear, so-called sexual impotence is very common; some way or other a person gets an idea——

Mr. McSHANE: Speak up, doctor.

A. A person may get an idea in some way or other that he is unable to have sexual intercourse, and then he will just be unable to have it as if he had an organic lesion; but of course the outlook for recovery is very much better when there is not any organic lesion.

Mr. EVERETT:

Q: That is just a question of his mind then, isn't it?

A. Largely a question of mind; it may be a question of general nervous exhaustion in such cases.

Q. Yes.

A. That defines that very fairly, yes, I think so, when there is not an organic lesion.

Q. Nervous exhaustion is not a permanent and incurable condition, is it?

Mr. McSHANE: Don't tell him everything, let him say something. I object to the question as leading and suggestive.

Mr. EVERETT: All right. I was following your methed of asking questions.

Q. Is nervous exhaustion an incurable condition?
A. Provided that the cause cannot be removed, yes.
Q. But if the cause can be removed why it is curable, isn't it?

Mr. MCSHANE: I object to telling him all those things.

648 The COURT: Yes, yes. He is your witness, Mr. Everett.
Mr. EVERETT: That is all, just a minute.

Q. Supposing a man had nocturnal emissions about once a week, would that indicate to you whether or not the functional parts, the functional powers or the parts were normal or not doing their duty?
A. It would to me make it more probable that he was suffering from a form of nervous impotence, yes. In case of organic impotence, for instance as the locomotor ataxia, or diseases of the spinal cord, emissions do not usually occur very frequently.
Q. But it shows, does it not, that——

Mr. MCSHANE: I object to that question.

Mr. EVERETT: Does it show that the parts themselves are doing their work?
A. What do you mean by "doing their work?"
Q. Well, that shows the glands are able to perform their work, does it not?
A. Yes, it shows that—of course the seminal vesicles must be able to contract and expel the fluid.
Q. It shows that if there is an emission at night, does it not?
A. Yes.

Mr. EVERETT: That is all.

Cross-examination.

By Mr. MCSHANE:

Q. What is the distinction that you make, doctor—I don't just follow you—between whether or not nocturnal emissions
649 are due to organic or a functional disorder; now tell us that again?
A. Well, I did not make, I did not try to make that distinction, but I tried—the distinction that I tried to make was when sexual impotence or inability to have sexual intercourse is organic——
Q. Yes.
A. (continued). —there is less likelihood of there being frequent emissions at night, because the whole mechanism that produces the emissions is likely to be suffering.
Q. What does it indicate then when emissions of that kind occur when there is no organic lesion.
A. Well, it indicates that the trouble is rather with the nervous control, or with the general nervous tone of the system. It is very common in any state *of* general state of nervousness or exhaustion,

and your sexual function is one of the first to suffer when a person is under any stress, when a person is simply greatly preoccupied either with work or with grief, or anything like that, he is likely to be temporarily incapacitated sexually.

Q. That indicates nervous exhaustion for the time being at least, doesn't it?

A. Not necessarily exhaustion, it may be—it may indicate—it very often is an indication of a suggestion that is working. A man may have an idea—it may be that he has got an idea tha[illegible]e is not able to have sexual intercourse, and if that fear comes up in [illegible]s mind at the moment, he is unable to have intercourse.

Q. I mean about emissions at night—well, I think you have told us that—in other words, it is an exhaustion for the
650 time being at least, that is the response—you have already stated that——

Now, doctor, when you spoke about no organic lesion indicating an organic nerve trouble, what do you mean, as distinguished from functional nerve trouble?

A. Well, I meant a lesion that there would be—that there would not be any lesion of any character that could be demonstrable. For instance, if we imagine that we made a complete dissection of a man's nervous system—of his nervous system——

Q. Yes.

A. (Continuing:) —we would not find any lesion that we could point out either with the naked eye or with the microscope.

Q. Yes, but there are a series of nervous disorders when there are no organic lesions.

A. There are so-called functional disorders.

Q. There are so-called functional disorders?

A. Yes.

Q. The duration of the functional nervous disorder is just serious to the patient while it lasts as an organic one only it is more likely curable?

A. As a rule it is less severe at the time.

Q. What is that?

A. As a rule it is less severe at the time, functional disorders are less severe at the time but there are exceptions to that.

Q. A duration of a functional disorder is entirely problematic, isn't it, may last for years or a lifetime, or it may be of shorter duration?

A. It depends very much on the cause and the disposition of the individual. If a person's heridity is such that he is disposed towards nerve troubles, it is likely to last much lon-
651 ger.

Q. With a sort of predisposition——

A. Yes.

Q. (continued). —it is a more serious thing?

A. Yes sir.

Q. You thought massage would help him, did you, doctor?

A. Yes.

Q. Rather to tone him up?

A. I thought it would he helpful in building up his muscles, and beneficial in overcoming his sensitiveness.

Q. I see.

A. Massage, gymnastics, taking various exercises, trying to bend his joints to the limit.

Q. There was nothing — your observation of an objective character, that would negative the fact that he was in fact suffering some functional nervous disorder, was there?

A. No, I thought that he was suffering from functional nervous disorder, yes.

Q. That was your opinion?

A. Yes.

Q. Now, talking about functional nervous disorder, doctor, of course, that varies in degree of severity, does it not?

A. Yes.

Q. And it varies as to the duration, doesn't it?

A. Yes.

Q. And it varies as to the degree of incompacity?

A. Yes, very much, yes.

Q. In a functional nervous disorder there are no pathological changes or objective symptoms, are there—or put it one way, there are no pathological changes in the nerves themselves, so far as you have been able to discover?

A. You mean on an anatomical examination?

652 Q. Yes.

A. No.

Q. In other words—even in hysteria—hysteria is a functional nervous disorder, isn't it?

A. Yes.

Q. And even a man or a woman or any person may have an arm rigid and carry it rigid all their lives and yet that arm be free and movable when under an anesthetic, that is right, isn't it?

A. Well, I hardly think all their lives, I don't know about that.

Q. What?

A. Well hardly all their lives, I don't know about that.

Q. Well, for years?

A. Yes, they may for years, although usually they are——

Q. Well, then——

Mr. EVERETT: Just a minute.

Q. Although what?

A. Although such hysterical rigidity as I know of usually don't last more than — months; they may last longer, perhaps.

Mr. MCSHANE:

Q. Well, haven't you known of them lasting for years, doctor?

A. Well, I think that I have in exceptional instances.

Q. In those cases the inability of the patient to move the arm is real, so far as the patient is concerned.

A. Yes, of course.

Q. As a medical man, there is nothing objectively that can be discovered to account for the inability to move, is there?

A. On physical examination?

Q. Yes.

A. No.

653 Q. So that you might say truthfully that there is nothing objectively, and yet you know from your experience as a medical man that the disability is real there?

A. Yes.

Q. In these nervous disorders I suppose that you figure, as you have said two or three times, suggestion has much to do with it?

A. Yes, particularly in the kind of disturbance that you described as contracture of the arm.

Q. And those are suggestions of which the patient is not conscious, in other words, an idea gets into his head that an inability is there, and it is real so long as that idea remains?

A. Yes, the disability is real while the idea remains.

Q. In your particular branch, doctor, you know the French School lay more stress on the fact of the suggestion than the English school?

Mr. EVERETT: I object to that. This witness is called as a fact witness, not as an expert witness.

Mr. MCSHANE: Oh, he is certainly an expert.

Mr. EVERETT: He is not; he is called as a fact witness; he made an examination; I have proved what he found on that examination.

The COURT: You have asked some expert questions.

Mr. EVERETT: I think he is an expert, I don't doubt it.

The COURT: You have asked some expert questions, if I understood. He may answer.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

654 Mr. MCSHANE: You are an expert on these questions, doctor, aren't you?

Mr. EVERETT: I object to that, that is allowing the doctor to designate, it is for the jury.

Mr. MCSHANE: Well, you qualified him. I have no doubt but what he is.

Mr. EVERETT: You might ask——

Mr. MCSHANE:

A. Dr. Bevin sent this man to you for examination?

A. Yes, I believe however, he did send the patient originally to Dr. Hugh T. Patrick but Dr. Patrick was out of town.

Mr. MCSHANE:

Q. Well, he is also expert on nervous trouble, isn't he?

A. Yes sir.

Mr. EVERETT: That is objected to, that is immaterial what Dr. Patrick is.

Mr. McSHANE:

Q. You rendered your bill to the Burlington Relief Department, didn't you?

A. Yes sir, I did.

Q. Dr. Bevin you understood represented them in sending the man to you?

A. Well, I don't remember how that was, I think Dr. Bevin's letter stated that he had been sent to him from the Burlington Relief Department for examination, and that he wished to have a further examination from a neurological point of view.

Q. I see. My the way, doctor, speaking about the litigation symptoms that you mentioned, that you referred to, you would expect an improvement in a person suffering from nervous disorder when the litigation ended because it would get that irritating
655 thought out of the patient's mind, that is the idea, isn't it?

A. Yes, he would not longer be so likely to dwell on his symptoms.

Q. Yes.

A. He would not be so afraid of forgetting some of them.

Q. It might improve the patient, and it might not, that is true, isn't it?

A. It generally does as a matter of experience.

Q. It might or it might not, I say?

Mr. EVERETT: I object to that. The doctor has answered it. He said "it generally does improve it."

Mr. McSHANE: I know, you have said it generally does.

The COURT: He may answer the question.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. McSHANE:

Q. You said that it generally does. I haven't any doubt but that is right, but it may not improve the patient.

A. I suppose there are exceptions, yes.

Q. In other words, for the same reason as to remove any other irritating cause, you would expect an improvement wouldn't you?

A. You would expect improvement, yes, on the basis of our general experience.

Q. How much the improvement would be is entirely speculative, isn't it?

A. Well, the general experience is that the improvement is very great, provided there are no organic lesions—that we have not found.

656 Q. If the result is that the case is won, that is rather pleasing, and you would expect more results than otherwise, wouldn't you?

Mr. EVERETT: I object.

The COURT: Overruled.

Mr. McSHANE:

Q. Wouldn't you?
A. Well——

Mr. McSHANE:

Q. Well, put it this way.
Q. Suppose that worry of the law suit was transferred to a worry of an unfortunate result, do you think that worry would not cut as much figure as the other worry?

Mr. EVERETT: I object to that question, it is highly improper.
Mr. EVERETT: Yes. He withdrew the other one. He ought to have nerve enough to go through with it.
Mr. McSHANE: I am not courting error, you know, I want this free from error. You like error.
Mr. EVERETT: That is, you lack nerve.
Mr. McSHANE: All right.
Mr. EVERETT: If the court sustains you you ought to stick by him.
Mr. McSHANE: Just let me alone a minute. I guess that is all, doctor.
Mr. EVERETT: That is all, doctor.
(Witness excused.)

Mr. EVERETT: Mr. Van Hook.

657 W. A. VAN HOOK, called as a witness on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Everett, and testified as follows:

Q. What is your name?
A. W. A. Van Hook.
Q. What is your business?
A. I am a civil engineer.
Q. How long have you been a civil engineer.
A. Well, for five years.
Q. Are you associated with the defendant in this case, the Chicago & Alton Railroad Company?
A. I am.
Q. How long have you been with the company?
A. Two years.
Q. In what capacity?
A. At present I am assistant engineer and chief draftsman, in the chief engineer's office.
Q. What experience have you had in the engineering line in Railroad work?
A. I have been on railroad construction, that is in charge on this road and other roads off and on.
Q. What other roads?
A. Chicago, Milwaukee & St. Paul; Pittsburgh & Lake Shore.
Q. Have you had experience in constructing railroad tracks?
A. I have.
Q. Signal systems?

A. I have put up signal posts, but I am not a signal engineer.
Q. But in a general way that comes under civil engineering, doesn't it?
A. It does.
Q. You understand about it?
A. I do.
Q. You have had experience along that line?
658 A. Yes.
Q. Are you acquainted with Grove street in the City of Chicago where the Pennsylvania and the Fort Wayne tracks run?
A. I am.
Q. Are the records of that locality and the ownership of the property kept in your office?
A. The ownership of what property we have is kept there.

Mr. McSHANE: I object to that as an assumption that the records do show ownership, your Honor; there are certain records pertaining to that question.
The COURT: Well, he said they were kept in his office. We will get to that later.

Mr. EVERETT:

Q. Are you acquainted with this locality shown on Defendant's Exhibit B?

(Counsel shows same to witness.)

A. I am.
Q. I call your attention to the semaphore pole marked with the letter "A" at the top of that exhibit. Have you seen that before?
A. I have.
Q. Do you know what railroad, or who maintains and operates that semaphore pole and the system of signalling there?

Mr. McSHANE: What do you mean, pole on what?
Mr. EVERETT: The operating part of it.
Mr. McSHANE: The operating of the pole on top.
Mr. EVERETT: The signal on top.
Mr. McSHANE: If he knows of his own knowledge—I do not want him to tell what somebody told him.
Mr. EVERETT: I am not asking him to testify to anything
659 that he does not know; I asked him if he knew that from his own knowledge?

A. It is part of the joint interlocking system at that place. This system is operated by the Chicago & Western Indiana Railroad.

Mr. McSHANE: He is—well, go ahead.

Mr. EVERETT:

Q. That pole is a part of the interlocking system at that point?
A. It is.
Q. You know where Grove street is, or would be on that picture?

A. It would cross—the south line of Grove street would be within a foot or two south of the pole.

Q. Does the pole stand on what Grove street would be if it were there?

A. Yes, I am sure it does.

Q. Is Grove street a vacated street?

Mr. McSHANE: Wait a minute, that is a legal conclusion.

Mr. EVERETT: All right.

Q. What do you know about Grove street as to whether it is a public street now or not?

Mr. McSHANE: I object to that as a conclusion. I have no objection to his telling what he saw or knows was done with Grove street, but it is a conclusion whether it is a public street.

Mr. EVERETT: Overruled?

The COURT: Yes.

Mr. EVERETT: You may answer, Mr. Van Hook.

The COURT: No, the objection will be sustained.

Mr. EVERETT: Exception.

660 To which ruling of the court the defendant, by its counsel, then and there duly excepted.

The COURT: Whether it is an open street he can tell.

Mr. McSHANE: I do not object to him telling everything.

Mr. EVERETT: Well, now——

Mr. McSHANE: Don't interrupt me. I don't object to this gentleman telling fully what he knows about what everything was done on Grove street.

Mr. EVERETT: You objected to the very first question. You objected. Now then you say you don't object.

Q. Mr. Van Hook, what do you know about the history of Grove street?

Mr. McSHANE: Its use, not its history.

Mr. EVERETT:

Q. As to its use.

A. There are tracks in it.

Q. Do you know and have you examined the records in reference to Grove street at that point?

Mr. McSHANE: I object to that, your Honor.

The COURT: Well, what do you expect to show by that?

Mr. EVERETT: I expect to show he has examined the records, and that the records shows that that street has been vacated by an ordinance of the City of Chicago.

The COURT: The objection will be sustained. There is a way to show that.

Mr. EVERETT: Exception.

To which ruling of the court the defendant by its counsel, then and there duly excepted.

Mr. EVERETT: That may be shown by a person who examined the record.

661 The COURT: Objection sustained.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. EVERETT:

Q. Have you any records of the use of Grove street in your office?

A. We have a map.

Q. Well, that is a record of it, isn't it?

Mr. MCSHANE: I object to that, he said it was the map.

The COURT: Yes. He is your witness. Proceed in the usual and proper manner.

Mr. EVERETT:

Q. Do you know whether or not Grove street is now used by the public for general traffic?

A. Why not on that side, not on that side of the crossing.

Q. By that——

A. Not on that side of the crossing.

Q. Do you know or have you a record of when it ceased to be used by the public for general traffic?

A. No, I have not.

Mr. MCSHANE: I object to any record. He said "no" though, didn't he?

A. I said no.

Mr. EVERETT:

Q. Do you know the Pennsylvania railroad bridge showed on Defendant's Exhibit C?

A. I do.

Q. Did you ever make any measurement with reference to the bridge and the clearance between that and the cars?

Mr. MCSHANE: I object to that your Honor. I offered to show the customary clearance and this gentleman objected when

662 I offered to show that, and the court sustained the objection properly, I think, because I think it is for the jury to say whether it is right or not in this case, whether there is sufficient clearance in this case, not what some other clearance is.

Mr. EVERETT: Here is a clearance he came through two or three minutes before he reached this one.

Mr. MCSHANE: I wanted to show the customary clearance and you objected, and I asked you on what ground you objected and you stated your ground of objection was because the question was not how others was but the question was how was this. That is apparently the law, anyway. I object to his now trying to show what he precluded me from showing.

The COURT: Objection sustained.

Mr. EVERETT: I offer to prove by this witness——

Mr. McSHANE: Not over here, I request it be made out of the presence of the jury.

Mr. EVERETT: I am trying to do it. I will get over in the corner, if you wish.

Mr. McSHANE: Well, I would rather you would.

(The following proceedings occurred out of the hearing of the jury.)

Mr. EVERETT: I offer to prove by this witness that the clearance between the car and the side of the bridge was one foot and one inch.

Mr. McSHANE: I object.

Mr. EVERETT: And that if the witness be permitted to answer the question he would so answer.

Mr. McSHANE: I object.

Mr. EVERETT: I also state to the court that the bridge that
663 is shown on this exhibit is the one which has been identified as being the one through which the plaintiff's train came. when he was on it a few minutes before the accident.

Mr. McSHANE: Let me say this, without waiving the right to the objection generally about that, I think that the photograph really shows it, I will withdraw the objection as to the bridge. I will certainly renew it as to anything else, as long as the picture really shows it is about that, I would just as soon let them have it on that bridge, I withdraw that as to the bridge.

(The above and foregoing was all that was heard out of the hearing of the jury.)

Mr. EVERETT:

Q. Did you make a measurement of the clearance between the west side of that bridge, and the train passing on the south-bound Pennsylvania track?

A. I did not. There was no train there at the time, I measured from the center line of the track—from the west rail of the bridge to that. I also know the width of cars, passenger cars.

Q. All right. Then are you able to state from that knowledge what that clearance would be?

A. I am.

Mr. McSHANE: Don't tell your conclusion. Let him tell the distance between the rail and the car, and when the car is on we can figure that.

Mr. EVERETT:

Q. What is the distance between the inside edge of the bridge, and the center of the track—is that where you made your measurement?

A. I made it from the rail.

Q. From the rail?

A. From the rail.

664 Q. From the west rail to the east side of the bridge?

A. Three feet, ten inches.

Q. How much?

A. Three feet, ten inches.
Q. On that side?
A. Three feet, ten inches on that side, yes.
Q. How much does an ordinary baggage car hang over a rail?
A. Two feet nine inches.
Q. How much would that make the actual clearance between the side of the car and the bridge?
A. One foot and one inch.
Q. Did you measure the distance between this next semaphore, as you came out of that bridge?
A. I did.
Q. What was the clearance between that semaphore and the rail?

Mr. McSHANE: I object to that.
The COURT: Objection sustained.
Mr. EVERETT: Well, I will make an offer of proof here on that—well, he hasn't that measurement so I will let that go.
Mr. EVERETT: I show you Defendant's Exhibit B, and call your attention to the semaphore pole marked "A" at the top.
(Counsel hands photograph to witness.)

Q. Did you make any measurement of the distance that pole is from the nearest rail on that track there, track B.

Mr. McSHANE: Is this the one in question?
Mr. EVERETT: Yes.

Mr. McSHANE: Ask him when he made the measurement, please.
665 A. I made the measurement day before yesterday.

Mr. McSHANE:

Q. You made the measurement day before yesterday?

Mr. EVERETT:

Q. Did you make the measurement?
A. I did.
Q. What is the clearance between that pole and an ordinary baggage car passing over that track marked B?
A. Two feet three inches.
Q. Is that when the car is directly opposite the pole?
A. That would be the end of the car.
Q. When it is right opposite the pole.
A. When it is at right angles there, right at it, yes.
Q. Did you make a measurement from the pole to the center of the track?
A. To the center of the track.
Q. Yes, or to the rail?
A. To the rail.
Q. And how much did you figure a car hung over the rail, how much?
A. Two feet nine inches.

Q. That is the ordinary and usual distance a car hangs over a rail, is it, an ordinary baggage car?
A. That is the maximum.
Q. That is the maximum?
A. That is the maximum car, I think is about that.
Q. You allowed for that in arriving at your two feet three inch clearance?
A. Yes.
Q. Is this track "B" located in Grove street?

Mr. McSHANE: Wait a minute.
Mr. EVERETT: Where is it located with reference to Grove street?

666 Mr. McSHANE:

Q. Do you mean if Grove street was extended?

Mr. EVERETT: No, not if it was extended, if it was right there, because that is a fact it is on Grove street.
Mr. McSHANE: I don't know whether it is or not.
Mr. EVERETT: I am telling you.
Mr. McSHANE: Wait a minute. It would be on a line in Grove street, it would be on a line in Grove street.

Mr. EVERETT:

Q. Does Grove street extend across those tracks?
A. The south line of Grove street runs across both of the tracks shown here (indicating).
Q. Is this track marked "B" on Defendant's Exhibit B, on Grove street?
A. At the——

Mr. McSHANE: You mean within the line of the street whether it be opened or closed.
Mr. EVERETT: I mean on Grove street.
Mr. McSHANE: I am going to have to object to having him by implication say whether it is a public street or it is not a public street. If the understanding is that he means that it is simply in what would be the street as extended, I have no objection.
Mr. EVERETT: I insist on my question in the form I put it.
Mr. McSHANE: I withdraw the objection.
Mr. EVERETT: Read the question.
(Question read.)

A. What track is marked B?
Q. That is this one here (indicating)?
A. That is partially on Grove street and partially not on Grove street.
667 Q. At the point where the semaphore is located?
A. That is entirely on Grove street.
Q. From that towards the front of the picture, towards this was (indicating)?
A. It crosses on to private property there.

Q. Crosses private property at this point marked D is that it?
A. A little farther back than that.
Q. Back, you mean this way, or that way (indicating)?
A. About where that letter B is.
Q. That is private property of the Chicago & Western Indiana, is it?

Mr. McSHANE: Wait a minute, I object to his telling whose property it is.

Mr. EVERETT:

Q. Do you know whose property it is?
A. I do not.

Mr. McSHANE: Well——
Mr. EVERETT: He says he don't know whose it is.
The COURT: Is that all?
Mr. EVERETT: That is all.

Cross-examination.

By Mr. McSHANE:

Q. Which direction does Grove street run, Mr. Van Hook?
A. It runs not quite east—north of east.
Q. That is somewhat northeast and southwest.
A. Yes.
Q. Taking this photograph which is called Plaintiff's Exhibit A, now would you sort of mark on there a line which you
668 think would be the boundary line of Grove street if it extended through. Put a little rule there, or a rule or something. Have you got a rule?

Mr. EVERETT: Mr. McShane, there is one or two other questions I want to ask.
Mr. McSHANE: Yes, yes, certainly.

669 Further direct examination.

By Mr. EVERETT:

Q. Just wait a minute on that, will you please, Mr. Van Hook.
A. Yes.

Mr. EVERETT:

Q. Are you acquainted with the construction of railway yards and tracks around Chicago?
A. I am.
Q. Do you know whether or not a clearance two feet three inches is an ordinary and usual clearance between a car and a semaphore such as you have indicated on Defendant's Exhibit B?

Mr. McSHANE: I object to that, your Honor.
The COURT: Objection sustained.
Mr. EVERETT: Exception.
To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. EVERETT:

Q. Do you know what — an ordinary and usual clearance for a semaphore pole adjacent to a track in and about yards around Chicago?

Mr. McSHANE: I object to that.
The COURT: Yes, the objection to that will be sustained.
Mr. EVERETT: Exception.
To which ruling of the court the defendant by its counsel, then and there duly excepted.

Mr. EVERETT:

Q. Have you placed semaphore poles in your business?
A. I have.
Q. Do you know how close you have placed them to railroad tracks?

670 Mr. McSHANE: I object to that, your Honor.
The COURT: Objection sustained.
Mr. EVERETT: Exception.
To which ruling of the court the defendant by its counsel, then and there duly excepted.
Mr. EVERETT: That is all.

Further cross-examination.

By Mr. McSHANE:

Q. Now will you kindly draw those lines, or have you already, on the photograph?
A. I have not.
Q. Outlining there where Grove street would be?
A. Don't you think we could use this map better, get a better record.
Mr. EVERETT: No.
Mr. McSHANE: No. You use the photograph, or are you able to do it?
A. I would not like to, for fear I would not get it drawn there right. Why not use the map?
Q. Well, take this photograph that he has been questioning you about and you locate it there. Now draw the line, please, on that one.
A. That I have located from our map, from the record in our office.
Q. Well, do it whatever way you told him, from that same source of information draw a line on the map.
A. I used my source of information then.
Q. Yes, use it now.

(Witness starts to examine paper.)

671 Q. No, the same source of information that you used in answering his question, you represented them when he asked you something about them?

A. I did, I looked them up.

Q. Put it on now as you remember it the best you can, without looking up anything. Just one so that I will know what you are speaking of.

A. I have drawn a line there about where I believe it to be.

(Witness hands photograph to counsel.)

Q. Now is that—where is the other line, can you put the other line on, too?

A. The other line would have to be farther over here (indicating).

Q. Put it on the side so that we will know what is included in the line?

A. It is practically impossible to show that.

Q. Does it cover all that (indicating)?

A. No, it does not cover all that is shown—there is an elevator property in there.

Q. Well, does it cover all these tracks?

A. It covers some four or five tracks in there.

Q. Now this thing—suppose that I put on at the bottom of this line "A" in lead pencil, and the top of the "B" we will say in lead pencil mark. Now which side of that is Grove street?

A. That would be the south line of Grove street.

Q. Well, that street, if it ran that way that would be the southeast line?

A. Yes.

672 Q. And then what is to the left of the picture?

A. That is to the elevator side.

Q. That would be the north line is towards the elevator.

A. Yes, towards the elevator, yes (indicating).

Mr. EVERETT:

Q. Where did he put that?

Mr. MCSHANE: Right here (indicating).

Mr. EVERETT: Where is the other one?

Mr. MCSHANE: Over this way. He does not draw the other one.

Mr. EVERETT: Over here (indicating).

Mr. MCSHANE: Yes, some place over there.

Q. Now, when you measured this post the other day you found that there would be a clearance of two feet three inches between the side of the baggage car that overhangs the rail two feet nine inches, and the nearest edge of that post?

A. I did.

Q. That is how you found it the other day?

A. Yes sir.

Q. What was the distance—now that is at the end of the car, at the end of a car?

A. Yes.

Q. That clearance that you have spoken of?

A. Yes.

Q. What distance did you find there was in the space between the pole and the rail the other day?
A. Five feet.
Q. Five feet?
A. Yes.
Q. That is five feet from this curved track?
A. Yes, from the rail.
Q. How far did you find that post to be from the frog?
A. It is 53 feet from the corner of it—from the nearest
673 frog corner.

Mr. EVERETT: Mark that on the photograph, will you.
Mr. MCSHANE: Yes.
Mr. EVERETT: Put it in ink.

Mr. MCSHANE: I will take this picture with this frog that Mr. Rea spoke about, and the section foreman, from this frog down here (indicating), to where this curved track crosses the frog, that is the first frog south of the pole, what is the distance from that frog to the pole as it now stands?
A. Fifty-three feet.
Q. Fifty-three feet?
A. Yes.

The COURT: What is that distance there?
Mr. MCSHANE: Right from here to here (indicating), it is 53 feet.
The COURT: Yes.
Mr. EVERETT: You have not got any marks there. Hadn't you better mark it?
Mr. MCSHANE: No, I think——
Mr. EVERETT: Mark it on Plaintiff's Exhibit "A," from here (indicating).
The COURT: Yes.
Mr. MCSHANE: Well, there is no use to mark it again. It is from the nearest point south.
Mr. EVERETT: From 1 to 2.
Mr. MCSHANE: Yes, that is to say——
Mr. EVERETT: Let us put it on B, our picture.
Mr. MCSHANE: All right.
Mr. EVERETT: On Exhibit B.
Mr. MCSHANE: All right, put it on the big picture at the same time.

674 Mr. EVERETT:

Q. From 1 to 2 on that picture, you say that is 53 feet?
A. 53 feet.
Q. On Exhibit B?
A. Yes.

Mr. EVERETT: On Exhibit B, it has already been marked.
The COURT: You excuse me a moment, gentlemen?
Mr. MCSHANE: Certainly.

(Whereupon a short recess was taken, at the end of which the following proceedings were had.)

The COURT: You may proceed, Mr. McShane.

Mr. MCSHANE: Yes, your Honor.

Q. I will ask you if you don't know it is a fact that that pole last fall——

Mr. EVERETT: I object.

Mr. MCSHANE:

Q. I will ask you if you do not know it is a fact that that pole last fall, the fall of 1910, was moved back 5 feet——

Mr. EVERETT: I object to the question.

Mr. MCSHANE:

Q. (continued). —or 6 feet?

Mr. EVERETT: Whatever appeared after the accident has nothing to do. Furthermore, you did prove here that the conditions had not been changed, you had evidence showing that the conditions had not been changed, and you were permitted to ask some questions based on that.

Mr. MCSHANE: You cannot get away with that, I don't think.

Mr. EVERETT: I think I can. You have slipped up yourself.

Mr. MCSHANE: We put on your section man, and he did not know of any change, he thought it was the same. Now, we have got people here that know all about that thing, got them in the hall waiting for this.

Q. Now, I will ask this man if he don't know that it is true that this pole has been moved, was moved last fall about 6 feet further from that frog, and a foot further from that rail, don't you know that that is true?

A. No, I don't.

Mr. EVERETT: I object to that question.

Mr. MCSHANE:

Q. Do you know whether it had been moved or not?

A. I do not.

Mr. MCSHANE: Well, we will show all about that.

Q. At any rate there is now a clearance of two feet three inches from the baggage car at the end that overhangs two feet nine inches?

A. Yes.

Mr. MCSHANE: That is all.

Mr. EVERETT: That is all.

(Witness excused.)

Mr. EVERETT: Dr. Hall.

JAMES WHITNEY HALL, called as a witness on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Everett and testified as follows:

Q. What is your name?
A. My name is Hall, James Whitney Hall.
Q. What is your profession?
A. I am a surgeon.
Q. When were you admitted to the practice of medicine and surgery?
676 A. In June 1891, about 20 years ago.
Q. What school are you a graduate from, doctor?
A. Graduate from the medical department of the University of Kentucky, Louisville, Kentucky.
Q. What hospital and school experience have you had?
A. Well, during the time and after I graduate- I served an interneship at Louisville. After leaving there, I located at Bloomington, Illinois, and practiced there about 11 or 12 years, during which time, I was connected with both the hospitals at Bloomington, both the Catholic and Protestant hospitals, the only two institutions of the kind there. For five years I was surgeon to the Illinois Sailors & Soldiers Orphans Home, a state institution near Blo-ming-, an institution of about 500 inmates, continuing my general practice, both medical and surgery during that time. About nine years ago I came to Chicago. Since coming here, I have devoted myself almost exclusively to emergency surgery, doing general surgical practice, doing practically no internal medicine, and doing hospital work for various hospitals in Chicago.
Q. You are acquainted with the pelvis of the human body?
A. Yes, sir.
Q. Will you give us an anatomical description of it?
A. An anatomical description of the bony pelvis?
Q. Yes.
A. The pelvis, the bony pelvis is a bony basin or bucket that is made up of two side bones, known by the general name of innominate bones, the two large bones on either side of the body, commonly known to the layman as the hip bones, the bones which you
677 feel on the side above (indicating). There is a large piece of apron like bone that comes up at the side known as the ilium, or the large support of the innominate bones. Then there is the pubic bone that comes around in front, the two of them coming together just above the genitals. Those are known as the pubic bones. Then there are bones back of that bone that we sit on, the bones that we sit on that are known as the ischium. So the pelvis bone, the innominate bone on either side is made of three large bones, the ilium, the ischium and the pubic bones, the ilium being the large bone that comes up at the side; the ischium being the bone that goes down that we sit on when — sit down, and the pubic bone being the bone that comes around and joines in front. The ilium joins behind, the heavy wedge shaped bone, which is the lower part of the spinal column, or back bone, known as the sacrum. That fits

in behind, and the two sides of the pelvis come on either side of it. Between those two bones is a joint which is known as the fixed joint, the sacral iliac joint, so named because it is the sacral and the ilium. The wedge shaped bone behind being known as the sacrum, and the bone at the side of it, being known as the ilium, and the two bones joining making the sacral iliac joint. Now, in front we have another joint, where the two pubic bones come together, known as the symphysis. This pelvic frame is located at the junction with the lower extremities of the body. It is a bony cavity that contains the genitals in women entirely, the uteris, ovaries, tubes, and so forth, inside of this pelvic bone. In the man, the contents of the pelvis is the bladder, rectum and small intestines that fold down, and lay in folds in the basin. This is also the connecting link between the lower extremities and the body. It is known or described of ten times as the——

678 Mr. McSHANE: I don't think——

A. (Continuing:) —teetering board, or the board——

Mr. McSHANE: Just a minute, just a minute, I do not think that this is competent, your Honor, let him ask a few questions and make a few answers.

Mr. EVERETT: I asked him to describe it, and he is doing it.

Mr. McSHANE: I do not think it means or implies that he should deliver a speech here.

The COURT: Well, you gentlemen know that counsel knows what we called the doctor for. I do not see myself, but I want the jury to get whatever information they may that may be of some benefit to them.

Mr. McSHANE: Cut it short.

The WITNESS (answer continued): —The pelvic bones are the bones that form the connecting link between the lower extremities and the body. The femurs or leg bones being set into it on either side, this opening (indicating with a sheet of paper) representing the side, where, for instance the left femur or leg bone set in here (indicating), and this representing the right (indicating). Then this pelvic bony frame is the bone that allows the play up and down when we walk. It enables us to lift our feet from the ground without bending our knees, holding a stiff leg. You can tilt the bony pelvis so that you can make a step, without having to bend the knee. This tee-ring board——

Mr. EVERETT:

Q. What effect does that have, doctor, on a man who has a shortened leg?

A. Well, it has this effect, that if a man's leg is actually shorter, physically shorter, the pelvis may be tilted, and it is tilted naturally to compensate for the shortening. That is why one with a shortening of an inch or an inch and a half of one leg a man may walk without limping.

679 Mr. McSHANE: Is this an argument, doctor. I object to this. Let him answer questions.

Mr. EVERETT: He is answering the question.

The COURT: Well, I think so, proceed.

Mr. EVERETT:

Q. What will that have to do?

A. The effect on the shortening, as I was proceeding to say is that it compensates for the shortening, the tilting of the pelvis compensates for an inch or an inch and a half of shortening. Therefore, in following a fracture of the leg, frequently where we get an inch of shortening, one will come out without limping.

Mr. McSHANE: I object, that is an argument.

The COURT: The objection will be sustained.

Mr. EVERETT:

Q. What effect would the tipping of the pelvis have on a leg that is shortened three-quarters of an inch?

A. A leg that was shortened three-quarters of an inch?

Q. Yes.

A. It would enable one to walk with natural, normal function, without limping.

Q. Suppose the pelvic bones were misplaced from one-half to three-quarters of an inch, what effect would tipping of the pelvic bones have on that, on his ability to walk?

A. I do not quite understand what you mean by displacement? Do you mean one pelvic bone is higher than the other or out to one side, what is it, or tilted higher.

Q. Well, I will show you an X-ray picture, which shows the exact, apparently the exact conditions, which is X-ray picture, Defendant's exhibit—what exhibit is that?

Mr. McSHANE: I do not know.

Mr. EVERETT: What plaintiff's exhibit is that?

680 Mr. McSHANE: The only X-ray.

Mr. EVERETT: It is the X-ray picture.

Mr. McSHANE: The only X-ray picture.

A. That is not a very good picture. Well, that picture shows—do you want me to state what the picture shows? Do you want me to state what displacement it shows?

Mr. EVERETT: Yes, what is the displacement you see in that picture?

A. That picture shows the displacement of one of the pelvic bones up on the other, of about half an inch at the junction of the pubic bones in front.

Q. Now, look at the picture at the point of the hip joints, is there anything wrong with the hip joints?

A. That shows a normal hip joint.

Q. Now, would the impairment or tipping up of the pelvic bones there have any effect upon a man's walking?

A. Not after it had gotten well, I mean not after there had been

a bony union. If bony union takes place a simple displacement of the hip or pelvic bones upwards for one half or one quarter of an inch, if they have united in a good bony union, the function of walking should not be disturbed, because there is no mechanical reason why it should.

Q. There is no mechanical reason why it should?

A. That is right.

Q. Assume, doctor, that a man about 36 years of age, in good health, was riding on the side of a box car, and came in contact with a semaphore post, standing beside the car and was brushed off and sustained a fracture of some of his pelvic bones, also a rupture of his bladder; that he was placed in a hospital and remained there for some months; that his bladder was drained with a tube; but
681 afterwards that healed in time; there were several operations on him; and he passed stones, but that had ceased, and the bladder was apparently normal; and the condition of the pelvic bones are as you see them now in the X-ray picture: Have you an opinion as to whether or not such an injury would affect a man's ability to have sexual intercourse?

A. I think it would until he got over the soreness.

Q. What?

A. But after it had healed, after the bones had healed, and after the parts had united, I can see no reason why it should affect his sexual power. There is nothing in the question that indicates that he has had any injury to the spinal cord or directly to the testicle or to the prostate gland or to the penis. So there would be nothing in this case that would disturb one's sexual functions after the general shock and disturbance of the injury had passed away, and the parts had healed.

Q. In looking at this X-ray picture, have you an opinion as to whether or not there has been a meeting or union of the bones?

A. Apparently, it shows a bony union of the bones in an abnormal condition. They have been slipped apart, and subsequently healed by a bony union. That is the appearance in the picture.

Q. Supposing one has nocturnal emissions with the absence of pleasant thoughts or brain suggestion, does that indicate to you whether or not the functional parts of those organs was impaired or not?

A. Well, I would say that they were not impaired as far as functionating is concerned. Nocturnal emissions usually occur from mental disturbance or some local irritation where there is an over amount of—or irritation, or something of that kind—it certainly is there—the normal function is certainly there.

682 Q. Would you consider a man that has nocturnal emissions once, about once a week, would you consider the functions normal?

A. Well, I think that would be governed very largely by his habits while he was awake. I mean by that the man's practices, his environment and his social relations have a good deal to do with his nocturnal emissions. It is not a question of physical condition, so much as it is a question of mental conditions.

Q. Doctor, what do you mean by objective symptoms?

A. An objective symptom is a symptom that is used by surgeons, physicians and surgeons to describe such conditions as may be obtained by the examining physician or surgeon independent of anything that the patient does or says, or, in other words it is something that we can find out independent of what the patient says or does. For instance, a broken arm, where we can take and bend the arm unnaturally and feel the bones rub together——

Mr. McSHANE: I object to that.

The COURT: Yes, the objection will be sustained.

Mr. EVERETT: I asked him what he meant by that and he is answering.

Mr. McSHANE: Oh, no, every question ought not to be an excuse for a speech.

Mr. EVERETT: Well, you don't seem to listen to the questions.

Mr. McSHANE: He don't need an excuse.

Mr. EVERETT: Well, have you anything further to say about objective symptom?

A. Only to illustrate what I mean by subjective.

Q. The court says you cannot illustrate.

683 A. If we find out——

Q. What about subjective symptoms?

A. Subjective symptom is a symptom upon which the surgeon—a symptom that the physician or surgeon has to depend on something that the patient does or says, something that we cannot tell by our own senses, something that we have to depend upon the individual's acts or the individual's statements, or his conduct to determine that. Valued only to the amount of the veracity of the conduct. It is a symptom that is under the voluntary will or control of the individual.

Q. Doctor, do you know what neurasthenia is?

A. Yes, sir.

Q. What are the causes for neurasthenia?

Mr. McSHANE: Is this gentleman a nerve specialist; he said he did not know.

Mr .EVERETT: Who, Dr. Hall?

Mr. McSHANE: Yes, I thought he said he had devoted all of his time to—what is it—this emergency, first aid service as a surgeon.

Mr. EVERETT: Don't let that bother you.

A. I didn't hear him.

Mr. EVERETT: Just answer the question, there has been no objection.

A. I wasn't paying any attention to him. Neurasthenia is a condition that is very fully described by calling it nervous bankruptcy or nervous prostration. That is an old common term for it. It is a condition that very frequently comes under the control or under the care of a surgeon, the emergency surgeon, and the general surgeon; it is also a condition that comes under the general practitioner and the neurologist; it is a condition of exhaustion and as a disease entity has a special mark on the system. The

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causes are many: Disturbance of digestion, stomach troubles, excessive work, overwork, mental or physical.

Q. Can it be caused by traumatism?

A. It may be caused by traumatism.

Q. In what way, doctor?

A. Why, we always have, following trauma, an acute nervousness that is described as surgical neurasthenia.

Q. First, this trauma is a blow, isn't it?

A. Trauma is external violence.

Q. Yes.

A. Something that does violence to the body from the exterior. We have neurasthenia or nervous condition known as surgical neurasthenia that follows an injury or follows a surgical operation, following an operation for appendicitis, following an operation for any condition of the body—that is the nervous condition that follows injury to the body, commonly known as surgical neurasthenia. We get the same kind of neurasthenia from Trauma, and as long as the trauma is of such a character that it keeps up a constant irritation that it keeps up something that attracts one's attention to the injury it is very liable to cause nervous condition. It is——

Q. Well, if the trauma, if the injury inflicted by the traumatic injury, or traumatism is cured, then what happens to the nervous condition, what happens to the nerves then?

A. The nerves return to their normal function, because there is no lesion of the central nervous system, it is simply reflex action. It is just like having sand in your shoe, as long as the sand is there it hurts you, it makes your nervous——

Mr. McSHANE: No, no, we ought not to have to stand this.

A. And when you remove this sand, then the nervousness disappears.

685 Mr. McSHANE: I object to that.

The COURT: Overruled, until he gets thorugh. It is along the line, I presume, of the defense.

A. Where we have a disease of the nerves in neurasthenia, there is such a condition that it produces a profound effect upon the central nervous system, and it produces well marked symptoms that are easily discovered upon examination.

Mr. EVERETT:

Q. What has pending litigation to do upon neurasthenia?

A. Anxiety is one of the most common causes for transient nervousness, and litigation following trauma, where the individual is consulting with different physicians and consulting with lawyers and talking continually about their troubles, and having presented to their mind their condition, and exaggerating their condition is one of the most common causes of traumatic nervousness or neurasthenia following injury, and the place that we find it most is in court following an injury litigation or until the litigation is over.

Q. Doctor, suppose that a condition of neurasthenia had been

standing for at least two years, would there be any objective symptoms that you could discover, that are discoverable?

A. Yes, sir.

Q. What would they be?

A. In the first place, the man would have a most pronounced exaggeration of all the reflexes, notably the tendon reflexes, like the patellar reflex and the olecranon reflex, that is, tapping the knee. You find the foot, instead of giving the normal reflex, will go up in the air to an exaggerated condition. In a condition of neurasthenia of two years' standing, you would find in practically all cases, a general interobtosis, meaning by that a general dropping or
686 relaxation of all the ligaments; in a woman, we find the uterus down, the ovaries down, and in the abdominal cavity, there would be the same thing, the kidneys and liver dropped, because neurasthenia is the pronounced prostration of the tone, the tone of the whole system, it gives away, and the whole condition, everything drops out of tone, general interobtosis.

Q. Doctor, from an examination of this X-ray plate, assuming that there had been a healing of the broken bones of the pelvis; assume that his bladder had been healed; have you an opinion as to whether or not the person of whom this is a picture—that is of his pelvis—is able to go to work?

A. Well, assuming that the bones are healed, of course that does not show the muscular condition. I know nothing about that. I am assuming that is normal.

Q. Assume that the muscles are normal, that he has control of his muscles.

A. I see no reason in the injury described in the picture, why a man should not have his normal functions and should not be able to do ordinary manual work.

Q. Doctor, have you observed the plaintiff in this case, the gentleman sitting back at the end of the table——

A. Yes sir.

Q. —in and about the court room?

A. Yes, I think I have.

Q. Does his appearance indicate to you anything in reference to the condition of his health?

A. Well, he looks well nourished. I noticed him walking with kind of an amble, or shuffled walk, which might or might not be genuine, of course, I could not form an opinion about that,
687 unless I examined the man, that is a matter that is completely under his control, walking is completely a subjective symptom, it may be voluntary.

Q. Is 157¼ pounds stripped a good weight, normal weight for a man 5 feet 5 inches.

A. A little above the average.

Q. Above the average?

A. Yes.

Mr. EVERETT: Take the witness.

Cross-examination.

By Mr. McSHANE:

Q. Doctor, you testify with great frequency, don't you?

Mr. EVERETT: I object to that question.
The COURT: Objection sustained.

Mr. McSHANE:

Q. Have you ever testified before?

Mr. EVERETT: I object to that question; it is immaterial.
Mr. McSHANE: Don't you spend practically all of your time around in this court testifying in these cases?
Mr. EVERETT: I object to that.
Mr. McSHANE: Well, all right.

Q. When did you first come to this city, doctor?

Mr. EVERETT: I object to counsel asking questions here that he knows are not proper, and which he does not intend to have answered.
Mr. McSHANE: Well, withdraw your objection, and we will see.
The COURT: I will overrule that.

Mr. McSHANE:

Q. When did you first come to the city?
A. To Chicago?
Q. Yes.
A. To live?
Q. Yes.
A. About nine years ago.
688 Q. How soon after your arrival did you first testify as an expert?

Mr. EVERETT: I object to that as immaterial.
The COURT: Yes, I do not know what that has got to do with this case. The objection will be sustained.

Mr. McSHANE:

Q. Well, is there any branch of your profession that you are not an expert in?
A. I could not tell you.
Q. Any of your patients ever indicate to you what they thought about it?

Mr. EVERETT: I object.
The COURT: Objection sustained.

Mr. McSHANE:

Q. Well, you are not an expert on nervous troubles, are you?
A. I do not know what you mean by an expert,—if you mean in the sense that I make a specialty——
Q. You do all other things—just a minute—just answer the ques-

tion, doctor, if you will. The speech part is over with. Are you a nerve expert, yes or no. Just say that, will you, or say you cannot answer.

A. If you will tell me what a nerve expert is, I will answer the question.

Q. You don't know what that means, do you?

A. Yes, I know very well what it means.

Q. Have you ever made a specialty of nervous diseases?

A. Not in the sense that I practice the neurological branches. I have made——

Q. You are——

Mr. EVERETT: I object to interrupting the witness.

A. I have made a study of the general nervous system in connection with the other branches.

Mr. MCSHANE:

Q. Don't you know that the court has indicated that you ought to quit?

689 A. When the court does, I will quit.

The COURT: Gentlemen, you will conduct this examination the same as it should be conducted. The witness will answer such questions as short as possible, and counsel will ask the questions along the same line. We will proceed with the trial of the case. Proceed.

Mr. MCSHANE:

Q. Well, now, doctor, you know that there are a number of eminent neurologist in the city, don't you?

A. Yes, I have the privilege of their acquaintance.

Q. Well, all right. Are you one of them?

A. I never have considered myself a specialist in neurology. As far as confining my practice to neurology, I don't do it.

Q. Are you a specialist in surgery?

A. I do surgery to the exclusion of neurology or chemistry, or practically, to internal medicine; I do some internal medicine work, but the most of my work is surgical in character.

Q. As I understand it, don't you know—you understand, do you not, that these questions pertaining to the nervous system and such like were put to you and you testified here and gave the jury your opinion on it, on the theory that you were an expert—you understand that, don't you?

A. That is not my understanding, I suppose he asked me for my opinion, and I gave it to him.

Q. Then you are willing to tell the jury that you are not an expert on these matters of the nervous system that you have been telling them about, are you?

A. I am an expert so far as my education, experience, practice, study and education goes.

Q. Of course, we do not know what that has been.

690 A. You know a good deal about it yourself.

Q. Yes, indeed I do.

The COURT: Gentlemen, we are getting off the line again.

Mr. MCSHANE:

Q. Now, on another branch?

Q. Is there any branch of anatomy that you have not testified as an expert in reference to?

Mr. EVERETT: I object to what other cases this witness has testified in, that has nothing to do with this case at all.

Mr. MCSHANE:

Q. I will ask you if you have not testified as an expert on the eye?

Mr. EVERETT: I object to that.

Mr. MCSHANE: I want to know. On your qualification, I want to know whether he is or is not an expert on that.

Mr. EVERETT: It is improper to have the witness designate himself as an expert.

The COURT: The objection will be sustained. He may proceed with the examination on such matters as this man has testified to. Let us keep within the record.

Mr. MCSHANE:

Q. Well, you never examined Wagner did you?

A. I never had the opportunity.

Q. You think then that there are well defined objective symptoms of neurasthenia, objective symptoms?

A. There are in genuine cases, yes, without exception.

Q. You would disagree with any nerve expert who thought otherwise?

A. I would. I am quite sure other authorities agree with me on that subject; I am sure that such men as we have in Chicago do.

Q. You were here when this other gentleman—you know Dr. Bassoe, don't you?

A. Very well, yes.

691 Q. He is a nerve expert, isn't he?

A. Well,——

Mr. EVERETT: I object to that.

The COURT: He may answer that question.

A. I understand that he confines his practice very largely to neurology.

Mr. MCSHANE:

Q. You did not hear him testify?

A. No, I did not hear him.

Mr. EVERETT: Exception to that last ruling of the court.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. Are there pathological changes in nerve disorders, in all nervous disorders?

A. Not in all nervous disorders, no.

Q. Or if there are, you don't know it, do you *do you?* If there are pathological changes, you don't know it, is that right?

A. Is that a question?

Q. Yes.

A. I did not recognize it as such. There are a great many functional disorders and diseases, in which there is no organic lesion.

Q. Can you tell, doctor, by looking at this picture, whether the man whose pelvis is represented here, has neurasthenia or not?

A. You mean that seriously?

Q. Yes, it appears to me like an absurd question?

A. Yes, very absurd.

Q. Oh, everything is absurd to you?

A. That is very absurd to me.

Q. You don't pretend to know anything about that, do you?

692 *Q. You don't pretend to know anything about that, do you?*

A. From the picture?

Q. Yes.

A. No, not at all. The picture only showed——

Q. When——

A. The picture only shows the bones, it could not possibly show this man's limping, whether it is genuine or not, it is simply a bony shadow, the shadow of the bone through——

Q. This man, whose picture we have here, may be suffering from neurasthenia, so far as anything in the picture shows to the contrary?

A. The picture shows nothing about the nervous system at all.

Q. A man may have sexual exhaustion and it be permanent, so far as this picture is concerned, that is true, isn't it?

A. I have already stated that the picture shows the bony frame only, and has no bearing on the central nervous system whatever.

Q. Now, doctor, you said that the reflexes—that in one suffering with neurasthenia that the reflexes are always exaggerated, is that right?

A. Yes, sir.

Q. Isn't it often the case, that they are absent entirely, doctor?

A. That is never true, except in paralysis of that part of the body.

Q. Haven't you testified contrary to that in this court house?

A. I have not.

Q. Wait a minute. Haven't you testified in this court house to the proposition that in nervous disorders ofttimes the reflexes are entirely absent?

A. I most assuredly have. Your question was entirely

693 different, nervous disorder and neurasthenia are two different things entirely. In nervous disorder, you might have a spinal lesion where you would get paralysis, followed with complete paralysis of the leg or arm where the reflexes would be entirely absent.

Q. Yet in cases of neurasthenia, the reflexes are exaggerated?

A. In cases of neurasthenia, the reflexes are exaggerated, unless there is paralysis of one part of the body, then you may have absence of the reflexes.

Q. Aside from any paralysis where the conditions are entirely functional, are the reflexes in all cases the same?

A. No, that is not the case. Very commonly, they differ in the same individual at different times, and in different individuals at different times.

Q. You spoke of reflexes, exaggerated reflexes as being an evidence of the existence or absence of neurasthenia? Now, I ask you if it is not true that a patient with a case of genuine neurasthenia, if it is not true with patients with genuine cases of neurasthenia, that some have exaggerated reflexes, and in some the reflexes are below normal, and some are entirely absent? Do they not vary?

A. They vary, but they all have exaggerated reflexes, some being exaggerated to a greater degree than others, and they may have greater exaggeration one day than they have another day.

Q. But they all exaggerate?

A. The only way you could put any stress at all or any importance on a reflex, would be to take it at different times, covering a period of different days, having the patient under observation.

694 Q. Whenever there is neurasthenia, the reflexes are always exaggerated, is that what you say as a nerve specialist?

A. What I say as to what?

Q. As an expert on nerve troubles.

Mr. EVERETT: I object to that.

Mr. MCSHANE:

Q. (Continuing:) —where there is neurasthenia?

Mr. EVERETT: Did you say "as an expert," he has not said that he was?

Mr. MCSHANE:

Q. Well, from your knowledge of nervous disorders, whatever that may be, do you know or regard it as your experience that whenever there is neurasthenia there are always exaggerated reflexes. Now, yes or no, just answer it right out yes or no?

A. Well, I have already answered the question that in neurasthenia——

Q. Answer the question yes or no.

A. (Continuing:) You always get an exaggerated condition of the reflexes in neurasthenia, in a genuine case.

Q. Do you imagine it would help a doctor any in determining the condition of a person, with reference to whom he was testifying, to have examined the man, had him under observation, or do you think one can come in and tell just as much about it, without ever having seen the man?

A. Why, sure, you could ascertain the positive facts better by an examination. In many of these cases we have only to take what information we can get.

Q. When did you first hear about this case, doctor?
A. Well, I really don't know what date, it was just a few days ago.
695 Q. Who called your attention to it?
A. I think Mr. Archer, who is connected with the firm——
Q. Oh, where had you been, where did you run across him when he first mentioned this case to you—in the court house?
A. No, I think it was at my office.
Q. You testified yesterday in Judge Walker's court room, didn't you?

Mr. EVERETT: I object to that.
The COURT: Yes, objection sustained, we have all we can do to take care of this lawsuit.

Q. You devote your almost exclusive time to emergency surgery, that is first aid, is that right?
A. Very largely conditions arising from external violence and trauma.
Q. A man falling from a street car in the street, or something of that kind, you are called in, and you take care of him until he is recovered, that is, the sense in which you use the term?
A. If they happen to call on me, I take care of him, if I am able to get there if I am not engaged in something else, I take care of him.
Q. Where do you take care of these first aid patients?
A. Take care of them wherever the opportunity presents itself; if it is in the street where they get hurt, why, I go and take care of them there; if they are brought to my office, and it is a proper case to take care of in the office, I will take care of them there——
Q. Are there enough——
Mr. EVERETT: Let him answer.
A. (continued). —if they are taken to a hospital or home, and send for me I take care of them there.

696 Mr. MCSHANE:

Q. Well, are there enough of these emergency cases to keep you busy?

Mr. EVERETT: I object.
The COURT: Objection sustained.
Mr. MCSHANE: That is all.
Mr. EVERETT: That is all.

(Witness excused.)

Mr. EVERETT: The defendant rests.
Whereupon the defendant rested its case.

And thereupon the plaintiff, to further maintain the issues on his behalf, introduced the following evidence in rebuttal, to wit:
Mr. MCSHANE: There is a witness or two at the office, and Mr. Griffin has gone to telephone for them. In the meantime, while he is telephoning, I will call Mr. Wagner to the stand for a moment.
(Joseph M. Wagner, the plaintiff, took the witness stand.)

Mr. McSHANE: I want to indicate to your Honor the purpose of this.

(The following proceedings occurred out of the hearing of the jury.)

Mr. McSHANE: I want to be heard, if your Honor please, for just a moment. I want to prove that interstate feature. May we step inside your Honor's chambers just a moment, or can I tell you here?

697 The COURT: Yes.

Mr. McSHANE: Here is the point. Under my agreement with counsel and the court, I do not seek to recover in this case under or by virtue of the Employers' Liability Law, so far as the Alton Road is concerned, or so far as any one is concerned; but here, as a matter of defense, they introduce what they claim amounts to a release between the*n* man and his employer. Now, as meeting that defense, and for the purpose of showing it is invalid, and that the release, what they claim is a release is not binding but is illegal, I want to show this. That at the time this man was injured, he was engaged in interstate commerce, the point of that being that the Employers' Liability Law states that a release or anything of that kind is invalid as between employer and employe who is injured while engaged in interstate commerce, the purpose being if this release is invalid as between this man and his employer, it surely is not valid as to somebody else. I hope I make myself clear; that I am not claiming the right of action under this Employers' Liability Law, but aside from any allegation in the declaration, aside—in other words, we are claiming under the common Law liability here. But as a defense, they bring in this release here. Now, if for any reason, we can show that release is invalid, I think it is proper in rebuttal to show that, and it is invalid if this man was injured while engaged in interstate commerce at the time of this accident.

The COURT (addressing Mr. Everett): What have you to state to that?

Mr. EVERETT: I object to any such proof. In the first place, in this case——

The COURT: Do you want to be heard on this question?

Mr. EVERETT: That is a withdrawal of that——

The COURT: Do you want to be heard on the question of his right to do this?

698 Mr. EVERETT: He has stated several times——

The COURT: I understand what he stated.

Mr. EVERETT: He has stated several times that it was out of the case.

The COURT: Yes, he does not claim he has any right to recover on that.

Mr. EVERETT: I understand his position, it is just as broad as it is long.

The COURT: Well, it may be and it may not be.

Mr. EVERETT: How is that?

The COURT: Well, it may be and it may not be.

Mr. EVERETT: I maintain that it is.

The COURT: If you gentlemen want to argue this now, you can do so. This raises this question that you said would come up. You can take it up and argue it right now if you want to, it comes up right now.

Mr. MCSHANE: Yes.

The COURT: Very well.

Mr. EVERETT: If he insists now that the Interstate Commerce proposition is in this case, I ask that a juror be withdrawn and the case continued and we be permitted to argue our demurrer, our plea of the statute of limitations.

Mr. MCSHANE: I don't know how to make it more clear, but I think the court understands my point.

The COURT: All right, I will hear you in chambers.

The jury may have a recess of five minutes.

(Whereupon the jury were temporarily excused and left the court room.)

(Court and counsel thereupon repaired to his Honor's chambers, and proceeded to argue at length the question of the admissi-
699 bility of testimony by the plaintiff to the effect that he was engaged in interstate commerce at the time of the injury in question.)

(During the course of the argument, and before the completion of the same an adjournment was taken until 9:30 o'clock A. M. of the next day.)

Whereupon an adjournment was taken until 9:30 o'clock A. M. Friday, May 19, 1911.

FRIDAY, May 19th, 1911—9:30 o'clock a. m.

Court met pursuant to adjournment.

Present same as before.

(The following proceedings occurred out of the presence and hearing of the jury.)

(Upon convening of court, counsel resumed the argument as to the admissibility of testimony by the plaintiff, concerning the question of whether he was engaged in interstate commerce at the time of the accident in question, the defendant, by its counsel, objecting to the admission of such testimony.)

The COURT (after argument): The objection will be overruled.

Mr. EVERETT: Exception to the ruling.

To which ruling of the court, the defendant by its counsel, then and there duly excepted.

Mr. MCSHANE: While we are at this, on another proposition, on another matter entirely, your Honor, I want to say this.

In the examination of the witness Van Hook, called by the defendant yesterday, the witness was asked these questions:
700 "Q. Do you know and have you examined the records, in reference to Grove street at that point?

"Mr. MCSHANE: I object to that, whether he examined the records.

"The COURT: What do you expect to prove by that?

"Mr. EVERETT: I expect to show that he examined the records, and that the street has been vacated by an ordinance of the city of Chicago.

"The COURT: Objection sustained."

Clearly they have not proved that, but I am willing in this case to admit, if the gentlemen care to accept it, either that this witness would testify that his records show that Grove street had been vacated by an ordinance; or I am willing to admit the fact that Grove street was vacated by an ordinance of the city of Chicago. They may have either one if they care to. Do you care to take either one?

Mr. EVERETT: Read that statement of Mr. McShane, please.

(Statement read.)

Mr. EVERETT: At the point where this accident occurred?

Mr. MCSHANE: Yes.

Mr. EVERETT: And at the point, where the track in question, that is the curved or "Y" track, as it has been designated, and the semaphore post against which he ran, was on that property.

Mr. MCSHANE: No, he has proved without objection where it was. I am just willing to admit what you wanted to prove, namely, that this street was vacated.

The COURT: That is between you gentlemen, if you want to agree with it.

Mr. MCSHANE: He indicated where Grove street was on the plat, and all that.

The COURT: Yes.

Mr. MCSHANE: Now, on this other proposition, I am willing to admit either the man will testify it had been vacated, or I am willing to admit the fact that it was in fact vacated by ordinance of the city of Chicago—whichever one he cares to take.

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Mr. EVERETT: Well, I am willing to take an admission that the land upon which this curved track, and the post against which the plaintiff collided, is located on what was formerly Grove street, and that that was vacated by ordinance of the city of Chicago.

Mr. MCSHANE: I will make no admission about its location. That has been shown; I will make an admission of the things that you offered to prove, namely, that Grove street was vacated by an ordinance of the city of Chicago. Now, if you care to take that admission, well *in* good.

Mr. EVERETT: At the point where the accident happened.

Mr. MCSHANE: Yes. That is where the street would be as indicated by the witness.

Mr. EVERETT: Well, that is at the point where the accident happened, isn't it?

Mr. MCSHANE: Well, I don't know.

Mr. EVERETT: Here is the map.

Mr. MCSHANE: I am willing to admit what you offered to prove: That Grove street was vacated across those tracks.

Mr. EVERETT: Well, we have proved the remaining part.

Mr. McSHANE: You did prove just where the line of Grove street would be, you did prove that.

Mr. EVERETT: No, you proved that.

Mr. McSHANE: Well, it has been proved anyway. On this one question, I would a little prefer to have the street vacated than not. You may have your way on that.

702 Mr. GRIFFIN: He said it was a foot or two south of the semaphore.

Mr. McSHANE (addressing Mr. Everett): What do you say?

Mr. EVERETT: I have given you what I agree to.

Mr. McSHANE: Then you will not accept either offer in the way I have made them to you.

Mr. EVERETT: I will accept your offer as I suggested, because I would have proved that if the court had permitted me to.

Mr. McSHANE: Well, just one thing in conclusion, and then I will stop there.

Now, I will repeat: I do want this clear, no uncertainty. I will admit either that this witness, Mr. Van Hook would testify that the records in his office would show that Grove street had been vacated by an ordinance of the city of Chicago at the place that he referred to; or I will admit that Grove street was in fact vacated by an ordinance of the City of Chicago at the place that he referred to.

Mr. EVERETT: I will accept an admission that at the point of this accident, the land formerly was a public street in the city of Chicago, known as Grove street, and that it had been vacated for the purpose of use of railroads.

Mr. McSHANE: All right, I am satisfied.

Now, there is another little thing. We will not have any trouble about that. In the examination of the witness Van Hook, the gentleman asked him this question:

"Q. Do you know whether or not a clearance of two feet three inches is the ordinary and usual clearance between a car and a semaphore, such as you have identified on the "Defendant's Exhibit B"?

I will admit that the witness would testify that two feet and three inches was the ordinary and usual clearance between a car

703 and semaphore such as he has indicated on "Defendant's Exhibit B"; or I am willing to admit it is a fact that two feet and three inches is the ordinary and usual clearance between a car and semaphore, such as he has indicated on "Defendant's Exhibit B"—whichever he cares to take.

Mr. EVERETT: I take this position: That this witness was called yesterday to testify, and was here before this jury; I asked him certain questions, and counsel objected to them, and the rulings were made. The witness is not here at the present time, I am unable to get him here; and I do not believe the conduct of the attorney is proper.

Mr. McSHANE: Well, that is your answer, is it?

Mr. EVERETT: That is my answer.

Mr. McSHANE: Well, I am willing to let it rest right there. Well, then the offer that I make stands open to be accepted or approved at any time.

Mr. EVERETT: And the record shows that the offers are made——

Mr. MCSHANE: Out of the presence of the jury.

Mr. EVERETT: Out of the presence of the jury.

Mr. MCSHANE: Yes. Now, here is something else. Are there any jurors in the room?

Mr. EVERETT: Yes, there are some jurors in the room.

The COURT: Any jurors tending on this case in the room will retire to the ante-room or to the corridor.

Mr. MCSHANE: On a proposition that will arise in a few minutes I want to make this statement. The witness Rea, at my instance, went to the scene of this accident, as he testified, in August, 1909; and he took certain photographs, and he testified that he took certain measurements. It was my instructions to him, and he re-
704 ported that he had complied with them, that he had inquired to ascertain if there had been any change in the situation between the time of the accident and that time, and he informed me that he had been informed that there was no change in the situation between the time of the accident and the time when those pictures were taken. I called a witness, the section foreman of this company as my first witness in the case. I did not know that there had been any change at any time, from that time until the present time; and I asked this witness if there had been any change and he said there had not. Later on, I think yesterday, possibly the evening before I was informed that there had been a change, that the pole was moved six feet farther away; and I was informed who the man was who made the change. I sent for him, and I had him under subpœna yesterday, and he is here today. It was not my intention to make any effort to prove that fact, but I wanted to keep him here in reserve, sort of anticipating, possibly, that counsel would come in here at the last minute, as they did, and prove the distances, which are different now than they were at the time Rea took the photographs. Counsel did do that. I am willing to do this now. If counsel will strike out or withdraw, or have the court strike out in any manner that he sees fit, in any manner that counsel sees fit, without any prejudice to the defendant, that part of the witness' testimony, in which he gave the measurements that he found the other day, between this post and the track, I will not ask to put on any evidence about the removal of the pole. If, on the contrary, counsel insists upon that evidence remaining in the case, I will ask leave and will call the man here who will testify as I am informed, that he made that change in the pole a little bit ago. Now, on this matter, I just come and give counsel his choice. I am willing this matter should be stricken out without any prejudice to him and I will go no
705 further in the matter. If he insists upon relying on that evidence, he has in I expect to make proof of the fact that a change has been made; I intend to call the man to testify in reference to the change.

Mr. EVERETT: The only bargain I made with Mr. McShane has proved rather disastrous, and one experience being enough for me, I do not think I will enter into any more agreements with him.

(The foregoing occurred out of the presence and hearing of the jury.)

The COURT: Tell, the jury come in.

(Whereupon the jury were brought in and the following proceedings took place in open court, in the hearing and presence of the jury.)

Mr. MCSHANE: Mr. Wagner take the stand.

JOSEPH MATT WAGNER, the plaintiff herein, heretofore called and sworn, was here recalled on his own behalf, in rebuttal, was examined in chief by Mr. McShane and testified as follows:

Q. Mr. Wagner, referring to these cars in connection with which you were injured, what if anything—oh, by the way, before that—in your prior business, you were a car taker at one time, you say?

A. I was a car marker, I was carding about 550 cars a night, that came in from Washington, Seattle, Dakota, and all over, from the Great Northern and Burlington Road.

Q. Well, you were car marker?

A. Yes, sir.

Q. What else did you do?

Mr. EVERETT: I object.

A. Why, those bills came to my hands——

Mr. EVERETT: Wait a minute, I object to a repetition in the evidence.

706 The COURT: Wait a minute, Mr. Witness.

Mr. MCSHANE: All right.

The COURT: Objection sustained.

Mr. MCSHANE:

Q. What, if anything, did you observe, as to whether there were any Government seals on these cars *cars*, or any of them, in connection with which you were injured?

Mr. EVERETT: I object to that question, because it is incompetent, and the seals are the best evidence. It is a conclusion that they were Government seals.

The COURT: If he knows whether there were any seals on these cars, he may tell.

Mr. MCSHANE: Do you know?

Mr. EVERETT: The objection is overruled?

The COURT: The objection is overruled.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. Do you know whether there were any Government seals on any of these cars?

A. Well, we had to wait there foe the—yes.

Mr. McSHANE:

Q. Do you know whether——

Mr. EVERETT: I move to strike it out as not responsive.

The COURT: Strike it out. That partial response is stricken out, excluded from the consideration of the jury.

Mr. McSHANE:

Q. Do you know whether there were any Government seals on the cars, did you see any?

Mr. EVERETT: I object to that.

A. Yes, I saw custom seals on it.

The COURT: What is the objection?

The WITNESS (answer continued): —or locks, there were either locks or seals.

707 The COURT: What is the objection?

Mr. EVERETT: The objection is that it is immaterial to the issues in this case.

The COURT: Overruled.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. McSHANE:

Q. Now, describe these seals to the gentlemen.

Mr. EVERETT: Wait a minute, the seals are the best evidence.

The COURT: What is the answer?

(Answer read.)

The COURT (addressing the witness): Let me caution you, when there is an objection made, you wait until the objection is ruled on. I could not hear your answer. Proceed.

Mr. McSHANE:

Q. Describe those seals, those customs seals.

Mr. EVERETT: I object to it, the seals are the best evidence.

The COURT: Objection overruled.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. McSHANE: Go ahead.

The WITNESS: Describe the seals.

Mr. McSHANE: Yes. Tell—we do not know what they were; tell these gentlemen about them.

A. Well, they are usually wire seals, with the U. S. Customs stamp on, and the port of entry, Seattle or Tacoma,——

Mr. EVERETT: I move the answer be stricken out.

A. (continued): —or Boston.

The COURT: It will be stricken.

708 Mr. McSHANE:

Q. It is not what is usual——

Mr. EVERETT: I object to an argument with the witness.

Mr. McSHANE:

Q. Tell what there were on these seals, what these particular seals were?

Mr. EVERETT: I object to that, for the same reason as stated before, incompetent, irrelevant and immaterial.

The COURT: Overruled.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

A. Well, I did not examine them thoroughly, but the customs man—we had to wait about twenty minutes before he opened the cars.

Mr. EVERETT: Wait a minute, I move that the answer be stricken out.

The COURT: Yes, that answer will be stricken out.

Mr. McSHANE:

Q. Whether you examined them thoroughly or not, did you see any of those seals, if you did, describe what you saw?

Mr. EVERETT: I object to that as having been answered.

The COURT: Overruled.

Mr. EVERETT: I object to the form of the question.

The COURT: Overruled.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. McSHANE:

Q. Did you hear my question?

A. No, what was it?

Q. Describe what you saw, in reference to the seals on these cars, describe the seals so far as you saw them, if at all.

709 Mr. EVERETT: I object to that, because the witness has just made a statement that shows he did not look at any seal.

Mr. McSHANE: No, he did not say that.

The COURT: Overruled.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

The COURT: Proceed, gentlemen, without argument; the jury heard it.

Mr. McSHANE:

Q. Did you hear my question?

A. I didn't get that.

The COURT: Read the question to him.
(Question read.)
The COURT: Answer that question.

A. Well, I did not—well, the customs man, he——

Mr. EVERETT: Wait a minute, I object to that.
The COURT: Yes, that will be stricken.

Mr. MCSHANE:

Q. Did you see the seals on those cars?
A. I seen them but I did not go close enough to examine them.
Q. I see. Do you know whether or not they were customs seals, U. S. United States customs seals.

Mr. EVERETT: I object to that.
The COURT: The objection will be overruled.
Mr. EVERETT: Exception.
To which ruling of the court, the defendant, by its counsel, then and there duly excepted.
The COURT: Or I sustain it I mean.
Mr. EVERETT: I withdraw my exception.

Mr. MCSHANE:

Q. What seals did you see on the cars?

710 Mr. EVERETT: I object.

A. Well, I think they were Great Northern seal-, and then they were these wire seals.

Mr. EVERETT: I object to that, and move to strike the answer out.
The COURT: Objection sustained.
Mr. EVERETT: I move to strike the answer out.
The COURT (addressing the witness): I cautioned you once before, when there is an objection, you wait; you will be given an opportunity to testify.
Mr. EVERETT: I move the answer be stricken out.
The COURT: Objection sustained to that. The answer will be stricken out.

Mr. MCSHANE: If there were more than one kind of seal, tell us what the different kinds were?

Mr. EVERETT: I object to that question, if the court please.
The COURT: He may answer.
Mr. EVERETT: Exception.
To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

A. There were Great Northern seals, I think and—there were Great Northern Railway seals—my recollection is there was—there was locks on the cars, and there might be seals, too.

Mr. EVERETT: I move that the answer be stricken out.
The COURT: Yes, that will be stricken.

Mr. McSHANE:

Q. Did you see the contents of either of the cars?

Mr. EVERETT: Objected to.

A. Yes, sir—excuse me.

711 Mr. EVERETT: The contents of the car can have no bearing on this case.

Mr. McSHANE: It certainly has.

The COURT: He may answer.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

A. Why, silk, bales of silk, marked "New York."

Mr. EVERETT: I move "marked New York" be stricken out.

Mr. McSHANE: That is what I am going to ask. He anticipated a trifle.

Q. What if anything, did you see on the bales of silk?

A. Why, they were painted with a brush "to destination,"——

Mr. EVERETT: Wait a minute, I would like to ask a preliminary question, that I think will have a bearing on the ruling of the court.

The COURT: You may ask it.

Mr. EVERETT:

Q. Aren't all shipments of freight, or wasn't this shipment of freight carried through from its point of origin to its destination on billing, isn't that right?

Mr. McSHANE: If he knows.

Mr. EVERETT:

Q. (Continuing:) —on way bills?

A. Yes, sir.

Q. And the way bills contain the information of the contents of the car, the number of the car, place of origin, place of destination, charges made upon it and other information, isn't that true?

A. Yes, sir.

Mr. McSHANE: That is not the only thing.

Q. Did you see—what did you see, if anything, on these bales of silk?

712 Mr. EVERETT: I object to it.

The COURT: Objection overruled.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

A. Why, they were marked "New York, New York City, New York."

Mr. McSHANE:

Q. What had been your regular work, Mr. Wagner at that time, and before that time, as to the character of the traffic, the cars that you switched?

Mr. EVERETT: I object to that, as having been answered.
The COURT: Objection sustained.
Mr. McSHANE: Exception.
To which ruling of the court, the plaintiff, by his counsel, then and there duly excepted.
Mr. McSHANE: It is his regular course of work.
The COURT: There is no question about that, I guess. Proceed.

A. Why,——

The COURT: Just a minute.
Mr. McSHANE: Just a minute.

Mr. McSHANE:

Q. What was your regular work as a switchman at that time?

Mr. EVERETT: I object to that.
The COURT: Objection sustained; he has been over that once; we cannot go over that again.
Mr. McSHANE: I did not think that it was, your Honor.
Mr. EVERETT: Yes.
Mr. McSHANE: Perhaps I am mistaken. Some witness said so.
Mr. EVERETT: This witness did.
713 The COURT: Yes, objection sustained.

Mr. McSHANE:

Q. Now, Mr. Wagner,——

The COURT: Excuse me just a moment, please.
Mr. McSHANE: Certainly.
(Whereupon a short intermission was taken, at the end of which time the following proceedings took place:)
The COURT: You may proceed.

Mr. McSHANE: I will ask you this question——
A. What is that?
Mr. McSHANE: I will ask you this question—of course if it is I do not want to go over it twice—what is the fact as to the journeys upon which the great majority of the cars which you handled was moving upon? .

Mr. EVERETT: I object to that. It is immaterial what other cars he worked upon. The question is, what the movements of this car consisted of.
The COURT: I lost one word. What is that question?
(Question read.)
The COURT: He may answer.
Mr. EVERETT: Exception.
To which ruling of the court the defendant, by its counsel, then and there duly excepted.

The WITNESS:

A. Why they originated in the western states, all the northwestern states such as Minnesota, Dakota, Montana, Seattle or Washington, and they went on east to Indiana, Ohio, New York, and all the Eastern states and Southern states.

Mr. McSHANE:

Q. What is the fact as to whether or not you handled those cars that you have just spoken of with this engine that you were working with at the time of the accident?

714 Mr. EVERETT: I object to that, that has been answered.

Mr. McSHANE:

Q. (continued). Or with some other engine?

The COURT: He may answer.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

The WITNESS:

A. I did not understand that thoroughly.

Mr. McSHANE:

Q. Did you use this engine 1516 to do this work you have just told about?

Mr. EVERETT: I object.

A. Yes, we used to break up——

Mr. EVERETT: Wait a minute.

A. Excuse me.

The COURT: Mr. Wagner, just a minute. You will have an opportunity to testify.

A. Yes.

The COURT: When the gentleman objects you wait, I don't want to have to tell you any more.

Mr. EVERETT: I have two grounds for that objection, one is that they have been over it, it is in evidence, and frequent repetition is prejudicial.

Mr. McSHANE: I will withdraw it.

Mr. EVERETT: Will you?

Mr. McSHANE: Yes. That is all.

Cross-examination by Mr. EVERETT:

Q. You cannot say positively that there were any government seals on that—on either of these five cars, can you?

A. Well, there were either government locks or seals on it,

715 because we had to wait for a custom man to open the cars at least 20 minutes.

Mr. EVERETT: I move to strike it out as not responsive to the question.

Mr. MCSHANE: I think it is, your Honor.

The COURT: It will be stricken out as an argument.

Mr. EVERETT:

Q. Can you state positively whether or not there were government seals on the five baggage cars in question in this case?

A. My best recollection is that there were government seals or either locks on the cars, because there always is on such kind of freight coming in.

Mr. EVERETT: I move to strike it out.

Mr. MCSHANE: I think it is competent.

The COURT: The latter part of the answer as to the cause will be stricken out.

Mr. EVERETT:

Q. Then you don't know whether there were seals or not, do you?

Mr. MCSHANE: I object, he just answered it.

The COURT: He may answer that?

A. What is that, please.

Mr. EVERETT:

Q. You do not know whether there were seals on these five cars or not, do you?

A. There were seals on, yes sir.

Q. Government seals?

A. Yes, there was government seals because he opened the cars—the government official did.

Mr. EVERETT: I move that be stricken out.

The COURT: Yes. Strike out the answer beginning with "because," that is stricken out.

Mr. EVERETT:

Q. Did you see the government seals yourself?

716 A. I did not examine them thoroughly, no I did not go right close to them.

Q. Did you see them yourself?

A. No sir.

Q. How?

A. No sir.

Q. The only reason that you say they were on there is because something else happened, is that right?

A. No, it is because when I was car sealer all that class of freight always had either government seals or government locks from the port of entry.

Q. Is that the only way that you knew that this shipment had government seals or government locks on it, because it customarily had been so when you were car sealer?

A. No, we had to wait 20 minutes for the——

Q. Is that the only way that you know of?

Mr. McSHANE: He just told you the other way, that he had to wait.

Mr. EVERETT: I object to counsel instructing his witness.

Mr. McSHANE: I am not instructing the witness.

Mr. EVERETT: Yes, you are, too.

Mr. McSHANE: No.

The COURT: There is too much talking done here this morning. The court is going to do the talking hereafter. Let us try this case like any other lawsuit is tried.

Mr. EVERETT: Read the question.

(Question read.)

A. There is another way.

Q. There is another way?

A. Yes, sir.

Q. What is the other way?

A. Well, we had to wait 20 minutes for the—the freight handlers had to wait 20 minutes there for the government custom man to come there.

Q. Are those two ways the only basis for your statement that the cars had government seals on them, is that right?

717 A. I stated before and because too, when I was car sealer taking the number of the seals——

Q. Yes, we have heard that.

A. That class of freight always carried a seal and lock, government locks.

Q. Then you waited 20 minutes?

A. Yes.

Q. Are those two ways the only basis on which you based your statement that these five cars had government seals on them?

A. Well, I saw the seals but I did not go close to them and examine them thoroughly.

Q. You do not know what the seals were if you did not look at them, do you?

A. Well, I know one was a Great Northern, but I did not look at the others closely?

Q. Are those the only two ways, the two facts upon which you based your opinion that the cars had government seals on them?

A. Another cause for that is the reason——

Q. I am asking if those are the only two ways?

Mr. McSHANE: Don't break in. You have asked "is there any other."

Mr. EVERETT: You would like to have him——

Mr. McSHANE: No, no.

Mr. EVERETT: I ask the court if that question cannot be answered yes or no?

The COURT: Read the question.

(Question read.)

The COURT: Now answer the question.

A. There is another way.

Mr. EVERETT:

Q. What is the other way?

A. Because they came from Seattle, from a Port of entry, United States Port of entry.

Q. Are those three the only facts upon which you base
718 your statement that the cars had government seals on?

A. I guess that is all.

Mr. EVERETT: I move his evidence be stricken out that the cars had government seals on them.

The COURT: The motion will be overruled.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

The COURT: Motion denied.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. EVERETT:

Q. When were you car sealer, what year?

A. Well, I——

Q. What year were you car sealer?

A. I took seals all the time while I was what we call car marker and the car sealer, and the number taker.

Q. When was that, what year?

A. Well, from 1891 up until about 1903, when I went to switching.

Q. That was five years before your accident, was it?

A. Yes, on and off.

Q. Don't the rules and regulations for the movement of the freight change, don't you know the rules and regulations for the movement of freight have been changed considerably in five years?

A. It has not been changed.

Q. It had not. Hadn't the Interstate Commerce Act been passed?

Mr. MCSHANE: I object to that, your Honor.

The COURT: No, he may answer that. He has a right to find out his source of information, what he knows about that. Go ahead.

719 Mr. EVERETT: Read the question.

(Question read).

The WITNESS: Passed according to safety appliances, yes.

Mr. EVERETT:

Q. Is that the only Act that had been passed that applied to the railroad?

A. That is all that I know of, all that I know of.

Q. These five baggage cars that were in your train at the time you were hurt, were unloaded in the City of Chicago, were they not, and transferred?

Mr. McSHANE: If he knows that?
Mr. EVERETT: Now I object to counsel——
Mr. McSHANE: I object to anything unless he knows.
Mr. EVERETT (continuing): —butting in.
Mr. McSHANE: He was in the hospital the evidence shows.
Mr. EVERETT: I object to that argument. The witness knew about all these things before counsel told him.
Mr. McSHANE: He would not without——
Mr. EVERETT: It is very evident you did it for the purpose of——
The COURT: Gentlemen, if that is going to throw any light for the jury, I would like to know. It does not do any good to talk so much. The court may be a little slow——
Mr. EVERETT: I object to counsel's conduct when I am examining the witness.
The COURT: We can get along a good deal better without so much talking.
Mr. EVERETT: Read the question.
(Question read.)
Mr. EVERETT: I asked the court to rule whether or not it was not highly improper for the attorney to make a suggestion before that question was answered. He made no attempt.
720 The COURT: He may answer the question.

The WITNESS:

A. I don't know.

Mr. EVERETT:

Q. Haven't you ascertained that fact from the records?

Mr. McSHANE: I object to that.
The COURT: The objection will be sustained.
Mr. EVERETT: Exception.
To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. EVERETT:

Q. Two of those cars were unloaded at Harrison street, were they?
A. One shipment taken out for the Grand Trunk.
Q. That was before you took charge of the train?
A. I was in charge of the train all morning.
Q. Was it before or after you took charge of the train and started to move it?
A. It was before we moved the train.

Mr. EVERETT: That is all.

Redirect examination.

By Mr. McSHANE:

Q. Did you take the cars to Harrison street——

Mr. EVERETT: I object to that.

Mr. McSHANE:

Q. (continued). —where the shipment of silk was taken out, or was it there when you first ran across it?

A. No, I took the car down to Harrison street to take this shipment out for the Grand Trunk, Toronto, Ontario.

Mr. McSHANE: That is all.

Mr. EVERETT: That is all.

(Witness excused.)

721 A. M. AHR, called as a witness on behalf of the plaintiff in rebuttal, having been first duly sworn, was examined in chief by Mr. McShane, and testified as follows:

Mr. EVERETT: May I ask this question of the witness? May I ask just a question of the witness?

The COURT: Yes.

Mr. EVERETT:

Q. You have been sitting in the court room all morning, haven't you?

A. I have been in here since ten o'clock.

Q. Were you in yesterday afternoon?

A. No sir.

Q. You heard the testimony given by the plaintiff here for the last half hour?

A. I heard that, yes sir.

Mr. EVERETT: I object to this witness testifying.

Mr. McSHANE: Well, it is not on that point at all, your Honor. I did not know that he was here. He was brought in here later in the case. He did not hear the instruction about separating the witnesses. I did not know that he was in the court room. It is a matter entirely foreign to those questions, it is on a matter entirely foreign to those questions.

The COURT: Just a minute.

Q. Were you informed by any one that it was not your place as a witness to be in this court room?

A. No sir.

Q. Until you were called?

A. No sir.

Q. You say that on your oath, do you?

A. Yes sir.

Q. No one told you to come in here, or anything about it?

A. I took it from the instructions that I got from the Judge last night to appear here at ten o'clock sharp. I took it to appear here in the room.

722 Q. You had never been informed by any one?

A. No sir.

Q. That you should not come into this room?

A. No sir.

Mr. EVERETT: If the court please, this order to exclude the witnesses was made by Mr. McShane himself.

Mr. MCSHANE: No, it was an agreement.

Mr. EVERETT: You made the suggestion.

Mr. MCSHANE: It was an agreement and the court entered the order.

Mr. EVERETT: You made the suggestion and the court at your request entered an order that the witnesses be excluded. The purpose is that one witness will not hear the testimony of the other.

The COURT: By agreement the court entered the order. The court has no right to enter the order without an agreement.

Mr. MCSHANE: Yes.

Mr. EVERETT: Yes.

Mr. MCSHANE: It is on a matter that this witness could not—your Honor can readily see that has nothing to do with what he testified to.

The COURT: I will say this, Mr. Everett—well, I cannot say just now without laying myself open to some objection. Proceed.

Mr. EVERETT: Well, the court overrules my objection to exclude the witness from testifying?

The COURT: Objection overruled.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

723 The COURT: If it is not a matter that has been gone into heretofore, or testified concerning this morning——

Mr. MCSHANE: I promise you that it is not on the Interstate proposition at all, it is not a matter than Wagner referred to. It is on the post, and nothing else.

Mr. EVERETT: Keep it on the post.

Mr. MCSHANE:

Q. What is your name?

A. A. M. Ahr.

Mr. EVERETT: I didn't get your name?

A. A. M. Ahr.

Mr. MCSHANE:

Q. How old are you, Mr. Ahr?

A. Fifty-one.

Q. Do you know the pole, the semaphore pole between what is referred to as the storage track or "Y" leading from the Pennsylvania over towards the Western Indiana, at Grove street, as shown on this picture.

(Counsel hands photographs to witness.)

Q. I refer to Plaintiff's Exhibit A and call your attention to this white post on the top of which is marked the letter E?

A. Yes sir.

Q. How long have you known that post?

A. Well, since 1895, in the summer of 1895.

Q. What was your work in the fall of last year, what kind of work did you do?
A. Why, I am a signal man.
Q. Signal man?
A. Yes.
Q. Did you do anything to this post that I have referred to last fall?

Mr. EVERETT: I object to that. It is improper to prove any condition existing after the accident?
724 The COURT: What is his business?
Mr. MCSHANE: Signal man.
The COURT: Who for, did he say?

Mr. MCSHANE:

Q. Who did you work for?
A. Chicago & Western Indiana.

The COURT: Objection overruled.
Mr. EVERETT: Exception.
To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE:

Q. What did you do, if anything, to or in reference to that post?

Mr. EVERETT: Wait a minute, I object. Do you mean since the accident?

Mr. MCSHANE:

Q. Last fall.

Mr. EVERETT: I object to the question because it is immaterial and incompetent to show any condition after the accident, or anything that has been done to a post that caused an accident after the happening of the accident.
Mr. MCSHANE: I want to say this in that connection, your Honor, that I do not want, and do not offer his evidence for the purpose of showing an implied admission on the part of any one that the post was too close to the track before this thing, but simply to show the change, to reconcile the testimony.
The COURT: That is what I supposed it was for. What is the question?
(Question read.)
The COURT: I think, perhaps the form of the question might be improved.

Mr. MCSHANE:

Q. Did you do anything to that post, if so, what?

Mr. EVERETT: I object to it unless the time is fixed.
725 The COURT: Well, he may answer that.
Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. McSHANE:

Q. Go ahead.

The WITNESS: Answer it?

The COURT: Yes.

A. Why we moved it back north six feet to give it more clearance.

The COURT: Wait a minute.
Mr. EVERETT: I move "to give it more clearance" be stricken out.
The COURT: Objection sustained. That part of the answer will be stricken out.

Mr. McSHANE:

Q. When you moved it back six feet, where did you leave it in reference to the rail, as close to the rail as it had been or farther away from the rail than it had been?

Mr. EVERETT: I object to the form of the question being leading and suggestive. I object to the form of the question as being leading and suggestive.

Mr. McSHANE:

Q. (continued). The rail of the curved track.

The COURT: Of course, the only place this was competent is as a matter of rebuttal, as regards certain statements of the defense that they brought in.
Mr. McSHANE: That is all.
The COURT: Now just——
Mr. EVERETT: Getting it in for one purpose and using it for another, that is what he is doing.
726 The COURT: I think that all it is competent — is to show that it was not in the same position as it was at the time of the accident.
Mr. McSHANE: Well, that is all I want to show, your Honor, that it was not in the same position—all right, it is only for the purpose of showing removal, that is all, I think I will accept the court's suggestion and not go any further on that.

Q. You worked for the—you had to do with these things when working for the Western Indiana, did you, the semaphore system?
A. Yes sir.
Q. When were you first subpœnaed in this case, Mr. Ahr?
A. Well, three days ago.

Mr. McSHANE: That is all.

Cross-examination.

By Mr. EVERETT:

Q. When were you discharged from the Chicago & Western Indiana Railroad Company?
A. Well, I was not exactly discharged.
Q. Not exactly, but when did they tell you that they were through with your services?
A. They did not tell me.
Q. When did you sever your connection with the Chicago & Western Indiana?
A. The first of May.
Q. A few days ago?
A. Yes sir.
Q. You don't feel very kindly towards the company?
A. How?
727 Q. You don't feel very kindly towards the Chicago & Western Indiana Railroad Company?
A. Oh, I don't know.
Q. What business had you been engaged in while you were working for the Chicago & Western Indiana?
A. Why, as a signal man, maintainer of signal- and switches.
Q. All the signals and switches in and about Grove street?
A. Yes sir.
Q. I show you Defendant's Exhibit B, and ask you if the post, the semaphore post marked with an "A" at the top is the one that you have reference to?

Mr. MCSHANE: Just a minute.

A. Yes sir, that is the one.

Mr. MCSHANE:

Q. That was maintained and operated by the Chicago & Western Indiana, wasn't it?
A. Yes sir.
Q. And they put it in there?
A. Yes sir.
Q. These are Western Indiana tracks along right here to the right?

Mr. MCSHANE: Wait, wait.
Mr. EVERETT: Don't keep saying "wait, wait, wait." You get me nervous, I told you that before.
Mr. MCSHANE: I don't care whether you get nervous or not, I don't want the witness to answer until I have the chance to see.
Mr. EVERETT: You don't give me a chance to get my question out. Read the question as far as I got.
(Question read.)
Mr. MCSHANE: Wait a minute, please.

A. Which tracks do you mean?

Mr. EVERETT:

Q. Here (indicating).

728 A. No sir.

Mr. EVERETT:

Q. What railroad company owned those tracks, do you know?

Mr. MCSHANE: Wait a minute. Don't answer. I object to that, what railroad company owns some other track. I put that in there only for one purpose, about the post. This is not cross examination.

Mr. EVERETT: Let us see what his knowledge of the situation is there?

The COURT: Objection sustained.

Mr. EVERETT: Exception to the ruling.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Mr. EVERETT:

Q. Do you know what railroad controls, operates or maintains that track marked D?

Mr. MCSHANE: Wait a minute. Is that the circular track?

Mr. EVERETT: The one that joins the circular track.

Mr. MCSHANE: I object to that, your Honor.

Mr. EVERETT: It is a part of the junction of the two tracks.

Mr. MCSHANE: I object to that, your Honor.

The COURT: Objection sustained.

Mr. EVERETT: Exception.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

Q. When did you move this post?

A. Why it was about the last week I think in October.

Q. What year?

A. 1910.

Q. The pole was moved which way?

A. North.

729 Q. North?

A. Yes, or very near north.

Q. The Chicago & Western Indiana Railroad caused that pole to be moved, didn't it?

A. Yes sir.

Q. Who directed you to move it?

A. The signal engineer.

Q. What is his name?

A. F. E. Jacob.

Q. Do you know what railroad operates and maintains these various railroad tracks at that point?

Mr. MCSHANE: I object to that, your Honor.

The COURT: Objection sustained.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant by its counsel, then and there duly excepted.

Mr. EVERETT:

Q. That semaphore pole up to 1908 had been in that position for a great many years, had it not, before you moved it?
A. Yes, sir.
Q. About how many that you know of?
A. Well, since '95.
Q. 1895?
A. Yes sir.
Q. During that time trains had been operated around this "Y" track shown on this picture as letter "B"?
A. Yes sir.
Q. Every day?
A. Every day.

Mr. EVERETT: That is all.
Mr. MCSHANE: That is all.
(Witness excused.)
Mr. MCSHANE: That is all. The plaintiff rests.

730 Whereupon the plaintiff rested his case in rebuttal.

The COURT: Any sur-rebuttal?
Mr. EVERETT: No.
Which was all of the evidence offered or received on the trial of the above entitled cause.

(Court and counsel thereupon retired to his Honor's chambers, and the following proceedings took place in chambers out of the presence and hearing of the jury.)
Mr. EVERETT: I move to exclude the evidence of the witness Sweeney, the first Sweeney who testified, I move to exclude his evidence and to exclude the two exhibits, the voucher and the bill—the bill rendered by the Alton railroad and the voucher. As the court will recall, the witnesses, who testified had not made the records on which they based their testimony, so the testimony was secondary evidence, when in fact the best evidence was available, and no effort is shown to bring in the best evidence. The court at the time announced further proof would have to be made, and the further proof not having been made, I now ask the court to sustain the ruling that he has made and exclude these two exhibits and the testimony bearing upon them.
The COURT: The motion will be denied.
Mr. EVERETT: Exception.
To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Mr. EVERETT: Now, I move to exclude the evidence as to
731 the first count of the declaration, so far as it applies—so far as that evidence is meant to support the charge that the movements of the train in question were movements made by it while engaged in interstate commerce. The proof is at variance with the declaration and the charges of the first count in that respect.

Mr. McSHANE: Talking about a variance, that has been very fully disposed of.

Mr. EVERETT: By our agreement?

Mr. McSHANE: The record shows what has been done.

Mr. EVERETT: I ask you do you claim it has been disposed of by our agreement; if so, I will stand by it.

Mr. McSHANE: The record shows what has been done.

Mr. EVERETT: Let us be fair with the court. I am asking you, are you claiming that that evidence was excluded upon my promise that I would not——

Mr. McSHANE: There has been no exclusion of the evidence.

Mr. EVERETT (continuing): —that I would not insist on a variance? Is that the position you are taking now?

Mr. McSHANE: If language conveys anything, I say it is an answer that we do not claim a right of action against the *the* Alton Road under and by virtue of the Federal Employers' Liability Act.

(After further discussion, the following proceedings took place:)

The COURT: The theory that the court passed upon the original agreement of counsel, pertaining to the pleadings, was that counsel for plaintiff was not in the first instance relying upon the Federal Act as a basis for his cause of action.

Mr. McSHANE: And that the defendant waived the question of the plaintiff's failure to prove those allegations.

732 The COURT: I was not passing on that. Your agreement went into that.

Mr. McSHANE: Yes.

The COURT: Your agreement covered that. I was just construing your agreement, that is all.

And thereupon, at the conclusion of all of the evidence, and before any other instructions were offered or given, and before the arguments of counsel, the defendant, by its counsel, moved the court, to exclude the evidence from the consideration of the jury, and requested the court to give the jury an instruction to find the defendant not guilty; and at the same time, defendant, by its counsel, presented a written motion and a written instruction to the same effect; and which said written motion and said written instruction are in the words and figures following, to wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 273,695, Term No. 6501.

JOSEPH M. WAGNER
vs.
CHICAGO & ALTON RAILROAD COMPANY, a Corporation.

733 And now comes the defendant, the Chicago & Alton Railroad Company, by Winston, Payne Strawn & Shaw, its attor-

neys, at the conclusion of all of the evidence, and before any further instructions are offered or given, and before argument of counsel, and moves the court to exclude the evidence from the consideration of the jury, and request- the court to give the jury an instruction to find the defendant not guilty, and with this motion, presents such instruction, in writing.

WINSTON, PAYNE, STRAWN & SHAW,
Attorneys for Defendant.

(To which said motion was attached the following instruction, appearing on a separate sheet of paper) "The court instructs the jury to find the defendant not guilty."

(Court and counsel thereupon retired to his Honor's chambers, and proceeded to argue at length in support of and in opposition to said motion for a directed verdict.)

But the court denied said motion and refused to give said instruction; to which action of the court, in denying said motion and in refusing to give said instruction, the defendant by its counsel then and there duly excepted.

Mr. McSHANE: At this time, before the commencement of the argument, I hand the court and counsel a copy of the special finding that I have requested, as the rules require.

(Thereupon counsel for plaintiff gave to the court and defendant's counsel, each a copy of the special finding hereinafter set forth and which was submitted to the jury.)

Mr. EVERETT: I object to giving this special finding.

734 The COURT: You may proceed, Mr. McShane.

Opening Argument of Mr. McShane.

May it please the court, and gentlemen of the jury:

The questions in this case are very few. There are just two questions, as I take it, for your determination, and one is: Was this company guilty of negligence; and the other is was this man himself exercising ordinary care for his own safety?

If this company was guilty of negligence, and he was exercising ordinary care for his own safety, that is all there is to this case. That is my contention. And all this evidence is important or unimportant, as it tends to prove or disprove these two, what we call, ultimate facts.

Now, just a word or two about some things that are not in this case, but counsel has tried to make something out of them.

Mr. EVERETT: I object to arguing anything that is not within the case.

The COURT: The gentleman will confine himself strictly to the record.

Mr. McSHANE: He objects before he knows what I am going to say.

He shows that this man commenced another suit. That is true. This man was injured down there in this network of tracks. He don't know who this track belonged to. They don't say who the

track belonged to. He put the case in my hands. It was my duty to him, to see that he got the right one, if possible.

This suit, as the papers show, was first commenced against
735 the Western Indiana, and I think the Santa Fe. He didn't know—this man had never been over the track before.

Mr. EVERETT: I object to this, as to what the man did not know; that is not shown by the evidence.

Mr. MCSHANE: I object to that—he says he did not know—I object to this man interrupting.

The COURT: Counsel is entitled to draw all reasonable inferences from the evidence.

Mr. EVERETT: Exception to the remarks.

To which remarks of counsel for plaintiff, the defendant, by its counsel, then and there duly excepted.

The COURT: Confine yourself to the record evidence.

Mr. MCSHANE: I object, he is starting in persistently to interrupt me in everything that I say. I object to it.

This man was knocked off the car. He says he never was over that track before. He was taken to the hospital. He apparently was under the impression that it was the Western Indiana track. He could not have know-. It must of necessity have been hearsay information. The fact that this suit was commenced against the Western Indiana indicates that my motion when the case was commenced, was that that was the company. After the case was commenced a further investigation disclosed——

Mr. EVERETT: I object to it, if the court please, as he is telling about after the case was commenced he made a further investigation about some conditions.

The COURT: You gentlemen know how to practice law. The court hasn't time, and doesn't desire to pass on these matters, inasmuch as the jury heard the evidence, and it is essentially for them, in these matters.

736 Mr. EVERETT: I am going to insist that he keep within the record.

The COURT: The court has already instructed counsel so to do.

Mr. EVERETT: Here is what he says, as transpired, he says what transpired over in his office, what he did after this case was brought to his office.

Mr. MCSHANE: No.

Mr. EVERETT (continuing): —about trying to find out who the real defendant is. Now, there is no evidence in this case about that at all.

Mr. MCSHANE: I am not doing anything of the kind.

Mr. EVERETT: He has no right to talk and argue about that.

The COURT: The jury have heard what the evidence is in this case, and the counsel will not——

Mr. MCSHANE: I certainly will not, I will not, and I did not——

The COURT (continuing): —get outside of the record.

Mr. MCSHANE: I take it that his conduct was intended to disturb me.

Mr. EVERETT: Let us have an understanding here. I take it I

have a right, whenever I think he has gone outside of the record, when he has done so, I think I have a right, within reason, to make an objection and have a ruling, and preserve my record on it.

The COURT: You may make any objection. Of course, the court cannot prevent you from making objections, but try to make your objections——

Mr. EVERETT: Within reason, that is what I say.

The COURT: Within reason, and have some consideration for opposing counsel.

737 Mr. EVERETT: I take exception to the remarks Mr. McShane has made.

To which remarks of counsel for the plaintiff, the defendant, by its counsel then and there duly excepted.

Mr. MCSHANE: I have tried some few cases in my day. Now, here, you see we can only win once. The question was to get the right party. We have got the right party here. We dismissed the Western Indiana; we dismissed the others; we added the Alton; we think we got the right party. He has shown you that we commenced another suit. True. Commenced it two days before the two years would expire. Two days before the two years would expire, we put them all in another suit. Why? Because, if we did not, and we should fail to show who owned that track, I would be indeed a very nice man, and I would have taken care of this man's interests well to say "why, here I thought the Alton did; now, they come in and say it was the Western Indiana, or it was this or it was that, and we are out. It is too late, too late to sue anybody else, two years has run by." If, on the contrary, if I commence the other suit, and there is hocus pocus work here——

Mr. EVERETT: I take exception to the remark about "hocus pocus work here."

Mr. MCSHANE: If——

Mr. EVERETT: Wait until I get a ruling.

The COURT: Yes, that is improper.

Mr. MCSHANE: I did not charge him with that.

Mr. EVERETT: Just a minute. I will have to have a ruling in order to preserve the exception here for review, whether that is a proper remark.

Mr. MCSHANE: I withdraw it. There is nothing to it. I will go on.

738 Mr. EVERETT: I take an exception to the remark.

To which remark of counsel for the plaintiff, the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE: I have got it this way, gentlemen. I thought I did the right thing with this man: I tried to. If the evidence had developed on the trial of this case that the Alton road did not own the track, but that the Santa Fe or Western Indiana, or somebody else did, I would not be too late, I could then, in that other suit, get after the right one; But if I had not commenced that other suit, I could not have gone on. He can win once and once only. We have got the right one. I only want to say he has not any other case against somebody else if this Alton owned that track, they are the

ones. Does the Alton own the track; have they been fair and honest with the court or anybody else in their attitude in this case? Furthermore, I asked—furthermore, the pleas positively affirm that the Alton does not own it, does not control it, does not operate it. It took two days of your lives and mine to prove that that statement was not true. Does the Alton own that track? We brought in their own men; we did not know what our proof might be, but we hoped. We went out with the strong arm of the law, that brought you from your homes—we went with the strong arm of the law, into the office of the Burlington Road, and the rest of them, and brought forth the documents. We showed that for 12 or 13 years, the Alton road had a man there who kept tab of every car that went over it, and he made a report to his company. We showed that the Alton track men kept the track in repair all these years. We showed that they rendered monthly statements to the Burlington, and others, for the use of every car that went over that track. More than that, we showed the very bills herewith the number of the engine and the num-
739 bers of the cars that were rendered to the Burlington road, and we showed that the Burlington paid them, and they stamped them. And yet they tell this court and you, over their signature what you know is false, namely, that they did not own the track, and that they did not control it. I have tried to get him on the start to say whether they did or whether they did not. He said they did not. Did he put in one syllable on that? Is there any man here on this jury that doubts for an instant, is there a shadow of doubt in your mind, or in the mind of any sane man that he knows the Alton owned the track.

Mr. EVERETT: I want to make an objection, if you will wait a minute. I never said at the time Mr. McShane asked me, as to whether the defendant owned that railroad track, I made no answer whatever. I told him that we had filed our pleas. I take an exception to the remark where he said I said we did not own that road, because I never made any such statement.

Mr. MCSHANE: I said——

Mr. EVERETT: I would like to have the court rule whether or not that was a proper remark.

Mr. MCSHANE: Well,——

The COURT: The court does not remember verbatim the testimony of any particular witness, nor does he remember the consultation and discussion of counsel. All the court can say is again to ask both of you gentlemen to confine yourself to the record.

Mr. EVERETT: I take an exception to his remark.

To which remark of counsel for plaintiff, the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE: I asked him if they admitted that they
740 were the owners of the track, and he said that they had filed their pleas. Maybe, the pleas were filed in good faith, I don't know. That is for you, that suggestion that they had not filed the plea, saying they were not the owners, in good faith. Now, let us drop all that. As I say, I do not believe they have been fair at all, in any way, shape or form. But that is not the question.

Now, did the Alton own the road? All the evidence is that it did; there is none that it did not. If it did not, there would have been a cloud of witnesses here; there would have been no question about that in this world and there cannot be at this time, in the mind of any right minded man, a doubt, I take it, that the Alton owned the road. Their silence is impressive. There is no question about it; they own the road. They always owned it, they knew that they owned it, but they thought that this crippled man might not be able to prove it.

Mr. EVERETT: I take an exception to the designating of the plaintiff as a "crippled man," as making it a play to the sympathy of the jury.

To which remark of counsel for the plaintiff, the defendant by its counsel, then and there duly excepted.

Mr. MCSHANE: Let us see if they are guilty of negligence. We know where that pole stood, at the side of the car. They are, as to this man—he will not deny that—there as to this man, they owed a duty of exercising reasonable, ordinary care, and it means something. They owe the same degree of duty that every railroad owes to its employes, that is, to exercise ordinary and reasonable care for keeping the tracks and equipment safe, so that the man
741 could perform his duty without unnecessarily peril. If everything is in perfect condition, Lord knows, there is enough danger incident to railroad business; men may fall, men may slip and be ground to pieces. The law requires them to do that, and if they do anything less than doing all that ordinary and reasonable care can do to make the place where this man performs this dangerous service, safe—anything less than that is negligence. It is negligence of a very grave type, to permit a pole of this kind to stand alongside of a car where coming within a few inches of a man, it just crushes the man almost to death. I do not think he will try to claim that there was not fault, serious, culpable fault on the part of the Alton road, in leaving that pole so close to this track.

One count in the declaration charges they put it there, and they negligently left it there. The last two counts simply say they negligently left it there, without any reference to who put it there. It is not important who put it there. They owed to their employes, they owed to the employes of every other company that went over that track the duty of seeing to it that that track was reasonably safe for use; no excuse at all to say that somebody else put the pole there. It was their duty; their absolute duty from which they could not escape to know that that track was right and safe for this man whom they invited to use the track. Now, if the pole was not in a safe condition, was not a safe distance from the track a safe position from the track, then the company is negligent. I am going to wait to hear what possible excuse or explanation he can furnish as to trying to justify the position of that pole to the track. It cannot be justified. I will leave it right there. If that is not negligence, if a railroad company can put a structure of that kind on a place where it may mean serious injury or death—day and night these men go
742 over those tracks—if they can put a thing of that kind up where a man in the honest and faithful discharge of his

duty may be crushed to death, and tell him nothing of it, if that is not negligence, well I do not know what negligence is. I am going to leave that proposition right there.

I say all of the evidence in this case shows that the Alton railroad was guilty of negligence, the grossest kind of negligence in leaving that thing there, where sooner or later it must mean the destruction of some man as it did mean the destruction of this man.

Now, he says this man was not exercising ordinary care for his own safety. Every man who sues must show that he exercised ordinary care for his own safety. Wherein was this man guilty of negligence? The test is what would an ordinarily prudent man have done under the same circumstances. If his conduct measured up to that standard, that is to say, if he did what an ordinarily prudent man would do, he is not guilty of contributory negligence. Now, wherein did he do different from what an ordinarily prudent switchman would do? He did not see the pole, that is, he did not know the danger was there. He saw the pole, it is true, but he did not know the pole was so close to the car, so that it would almost crush out his life. He says that he did not. You know he did not. Self preservation is the first law of nature; the first thing that springs up in the human breast is the law of self preservation, before all else comes that one thing; every man thinks he will preserve himself at all risks from all known dangers. So I say it is not difficult to believe that this man did not know that he was going into this trap until it was too late to escape. But they say, if he had been exercising ordinary care, he would have known it before that? How would he have known it before that? It was the first time
743 he was ever over this track in his life. On approaching this pole around the curve, he was in charge of that train. They were in a hurry. It was an important, precious train and cargo; the safety of that train and all the crew were in his keeping. He was going into a network of tracks, all strange to him. Never been there before. The towerman had thrown the switches. Look at that map (indicating), nobody could tell which track a man is going on until he gets there. He is up here at the head end of his train to watch. The man at the forward end there had enough to do; he had this brake apparatus; he was back there where he could not signal. Does any man doubt that it would be unsafe to run that train down there, that engine with five cars away down there without somebody up there to watch where they were going. Some train might be derailed, there might be some derailment, the Lord knows what. Of course, it was somebody's duty to be up on the forward end to watch where they were going and give the necessary signals to the engineer. That is where this man was. He had to look ahead. He saw that pole, he saw the pole—as you recollect, as he just passed that pole, that other pole (indicating on photograph)—on that pole which he had just passed, he had twice the distance—this picture will show it—it would be practically that in between there. He saw the pole, but he had a right to assume that the pole was a proper distance from the track. It is a principle, or it is elementary that every man has a right to know on a railroad, or anywhere else—it is elementary

that every man has a right to go on the theory that everybody else will do his or its duty to him. As you come along, when you are crossing a boulevard, and a car is coming up, you know the law requires them to stop on the nearest side, and you may drive
744 on. They may not stop, but it is their duty to stop, and you have a right to go on the theory that people do their duty, and you are not negligent in driving across there. If, perchance, they drive on and do not stop, you say they ought to have stopped. Yes. Suppose you are getting on a car and you have got a bundle or something; it is the duty of the man not to start until you get on. You have a right to assume that he will do that. If he starts too soon, you may be hurt, it is possible that you may be hurt, but you have got a right to assume, until you know something to the contrary, that the other man is doing his duty. And every employe—while it was the duty of this railroad company, and the Burlington Railroad Company, and every railroad company to its employes and others to keep the structures a proper distance from the track, every man using the track has a right to go along and rely upon the assumption that it is a proper distance from the track until he is in some way informed that it is not. This man supposed it was a proper distance from the track. He saw it, as I say, he saw the pole, looking down the line, swinging around this curve, and you can readily understand, he hung on the car over here, this way (indicating), and going around this way, the pole was over here (indicating), and he did not even then—when the pole comes up there to the end of the car 18 inches from the side of it—18 inches from the side of the car by the measurement as to the conditions as they were there then—even that, when the car stood on this curve, it hugs in here (indicating), until it came there within a few inches of the side of the car—can you say now, gentlemen of the jury—that is the question, although you know this man did not want to get hurt, although you know that he was not idling, he was not listless, he was tending strictly to his employer's business, vigilant, active, anxiously looking out—and yet they want you to say what? That no ordinarily prudent switchman could have failed to
745 learn of that danger, no ordinarily prudent switchman could have failed to learn it without gross carelessness upon his part. Now, to start with, it is not here now for you where you are in positions of absolute safety and security, from this position to look at the question of what is care, that is not the viewpoint by which this man's conduct is to be judged, from which this man's conduct is to be judged. It is as to whether the man, with his duties, out there on those strange tracks, with these duties to look ahead, to signal, and all that thing under his charge and control, as to whether a man of that kind may not have failed to discover this danger in attempting to avoid it, as he did. Now, none of you have ever been on a railroad—never have been railroading—so you have all said—so you don't know; probably I don't know—I know I don't know. Supposing a man is out on one of those lake boats, and he tells you he did so and so. You don't know whether that is the right thing or the wrong thing. To a sailor, it may seem that that is the right

thing to do; to a layman, it may seem the wrong thing. So with railroad men. Their duties are manifold. We don't know—he was talking about Potts signals—those are those little signals that scarcely stick up above the ground—and as a man goes along there, there are innumerable troubles; a man must watch those, he watches the engine, he watches all of those things. We cannot get, from our little knowledge of railroading experience, we cannot get that situation as it presented itself to him. In a case of this kind, when there is not the least doubt, not the slightest doubt of the culpable fault of this railroad company, why search the clouds and guess and speculate that perhaps some other railroad man might have done differ-
746 ently from what he did. Wagner's life was as precious to him as yours is to you, and it is safe—it is safe to go on the theory that what Wagner did then appeared to him to be the right thing to do, appeared to him to be the right and the proper thing. And I say there is not any good grounds for claiming in this case that he did differently from what an ordinarily prudent man would do.

Now, on the question of his injury, it has been 2 years and 5 months since that accident. This man was crushed there. This X-ray picture, you will have it in your jury room; you can see that one side, both in front and back, as Dr. Potter told you, stands up 3 inches—or ¾ of an inch, above the other side, right near the spine here, it is broken in front, it is shoved up there in that position (indicating). You can see that, you don't need a doctor, you don't need the opinion of any doctor on that score. That was done, his bladder was torn, it was a dirty wound, one of those, as the doctor said where infection sets in. Infection did set in there, he had inflammation and infection, and there was this pus matter running out of those various holes in his body where that thing was drained for months. He was operated on again along in April following this accident, and there was inflammation, some more subdued inflammation, and that followed by catarrh, which is subdued inflammation, it is chronic, and there has been a catarrhal condition, and under all of the evidence in this case, there is now, in this man's bladder. He was nine and a half months in the hospital, *nine and a half months in the hospital,* taken care of by these doctors. $1,300 they say, $1,300 is the doctors' bills, the necessary medical expense of this man up to the present time. Talk about his injury, *injury,* or a condition that justifies the charge or requires a doctors'
747 bill of $1,300 to these different doctors, you cannot get away from it, it is a serious condition. There was not a man that got on the stand there who said that this man is able to work, even now. Nobody, except Hall, who looked at the picture—they say they hope that by massaging and so on, if he starts at some light work, he may improve and so forth. But no man told you he would ever be able to switch cars again. There is no suggestion by any witness in this case that this man will be ever able to follow his usual vocation; not a suggestion by a man in this court. He has told you about his nervous condition. Now, maybe some of you happen to know something about those nervous disorders; maybe some of you know that

men suffer excruciating pain and torment, amounting to great and almost permanent incapacity, when you cannot see a thing. This man says that he is in this condition. The Burlington Relief doctor says he believes this man is telling the truth. The specialist also said the same thing. Now, why are you going to let—why are you going to say "Why, maybe Wagner is not telling the truth." He says that he is. Those men skilled in the business say that he is; and they say that if he has these things that he complains of, that he is in a bad way, and that it is entirely speculative, entirely so as to when he will get out of it. Now, maybe he will get out of it soon, maybe he won't. He never will, under the evidence in this case, he is a cripple there, that is, he is crippled there in the pelvis, there is that change in the position of the pelvis; there is this condition of the bladder. He never will get all over those things. If he is entitled to anything, he is entitled to full compensation. He is entitled to compensation for the past and the present and the future.

748 Right in that connection I want to say that this company is not entitled to one five cents' worth of credit, by reason of the Burlington Relief Department. This man paid for that, this man and his fellow workmen. These men out on the cars day and night, they pay his bills. Even what the Burlington paid was small. During all of the years he worked, he helped to pay for some other of his comrades who were sick or disabled. And it is these horny handed men who take their lives in their hands every day, they pay this money for these men, not the Alton road, nor even the Burlington road—the amount that they contributed was small, but the Alton never contributed five cents. Suppose you take a policy of $10,000, and also suppose you sustain an injury that is worth $10,000. Now, out of your earnings you have paid for that policy, and when you have got the injury, the Insurance Company pays for it. Do you think the railroad company that inflicted the injury ought to be credited with that? Not at all. Not at all; they are not entitled in this case to five cents' credit for what the Burlington Relief Department gave to this man. I repeat that the Burlington Relief Department is no more than the collective train men employed by the Burlington road. Why should this Alton road be permitted to take advantage and profit and be credited by the earnings that these other men contribute under this agreement to this man who was stricken down? The law, I think, the court will tell us is that they are not entitled to a cent on that score.

Now, then, what has this man lost? He has lost—he received $110 a month, gentlemen of the jury; he had worked in this work all of his life in this railroad business; he had been five or six years, something like that, in the switching department, but he had been

749 a conductor, and he was working up. Where it would have ended, we do not know. But the best railroad men in the country followed the route that he was traveling. They don't all get to the top, but some do, and he might have, we do not know whether he would or would not, but he had gotten to where he earned $110 a month, $110 a month for 2 years and 5 months, is $3,190. But, as I say, no one has suggested in this case that this

man has been able to work until the present moment, nobody has suggested that he has been able to do anything. They say if he took massage, and started on some slight work, he might be able to do something later on.

Now, about the man's future. Has this earning capacity been diminished? Why, you know that it has. He cannot switch again. There is no suggestion in this case, in this evidence, that he can ever switch again. Has his earning capacity been decreased? Supposing that he earned—that his earning capacity was reduced by one half, figuring from now until he is 65 years old, there is something like 28 years, and if his earning capacity was reduced by but one-half, he would have lost in earnings alone, some $18,400, which with that he has already lost would be some $21,670. Supposing that his earning capacity is only reduced a third, supposing he is able to earn 73 or 74 dollars a month, and had lost only one third of his earning capacity, with only one third of it lost, he will have lost something in the neighborhood of fifteen thousand and some odd dollars. It is not alone a question of earnings—in fact that is to my mind the small end of these things. It is the pain and suffering. It is not only your privilege, but your duty, in arriving at a verdict in this case, to award this man what you can say is full compensation for the pain and suffering that he endured during the nine and a half months while he was in the hospital, if there is any way by which it can be figured out definitely. But it is your
750 duty under the law, and the court will tell you so, to compensate him as far as money goes for his pain and suffering—in other words, while he had this inflammation in his bladder, with these tubes discharging pus from different spots—six months he said he was in bed, six months in bed; he had that inflammation there, and he has had inflammation there ever since. Now, as I say, I do not think it ought to be a disagreeable duty, but it is your duty, nevertheless, gentlemen of the jury, in assessing damages to this man to award what you can say on your conscience and your oath, as jurors, is full compensation for his pain and suffering, past, present and future, and his loss of earnings, and all that. I claim that this man is entitled to a verdict here, a very large verdict, the amount of which is entirely in your hands. I want you to listen to what this gentleman will have to say, and I may have a word to say in conclusion.

Argument of Mr. Everett.

May it please the court and gentlemen of the jury: I wish, first, to compliment this jury upon the attention that you have given this case. Very often, in a case of this character, it becomes tiresome to the jury, because they do not understand the bearing that the questions and conduct that the lawyers have to go through will have on the case, but it all has a bearing. You would see something brought out one day, then you might not see the bearing it had on the case until the very last day of the case, and sometimes that is annoying to the jury; but I do not think you gentlemen have

been annoyed very much or become restless. I appreciate it, and I think Mr. McShane also appreciates the attention you have given this case.

751 When you were examined as jurors, you all testified that you would treat the Chicago & Alton in this case the same as though it were an individual. I believed you then; I believe you now. I recognize in my experience, I have seen that perhaps jurors who are not lawyers but laymen, engaged in different walks in life, have a natural tendency to bring in verdicts against railroad companies, or have a tendency to favor a man who is injured; and, although you all testified that you could forget that, that you could decide this case on the liability under the law, yet I fear that there is that tendency lurking in every juror who is not accustomed to court work. They do not appreciate that it is necessary some times to say that a man is injured by his own fault. It is hard to do, it is hard to say that, and I know it. I know very often there is a feeling against corporations, and railroad corporations especially; and I feel that, as I stand up here and talk to you men that, although one of you have sworn you had no feeling, and I believe you honestly think that, yet down in your hearts you must read your own conscience, and see now whether or not there is such a feeling, whether it has crept into your conscience during the trial of this case, and if so, eliminate it. You have said that you would do it. I asked you to do it, and I ask you now to try this case on the facts that I am going to present here in my argument, depending entirely upon the evidence of the witnesses.

As Mr. McShane has told you already what it is necessary to prove to make out a case, I need not repeat it any more than to say that he had to prove two things: First, that the Alton Railroad was

752 responsible for the accident to this man; second, that the accident to this man was not caused by himself, by his own negligence. That degree of care that the Alton Railroad must use in the construction and maintenance of its track is fixed by a fixed standard of law, and that that standard is what an ordinarily prudent other railroad company would have done under like circumstances. It is not a question of what you think the Alton Railroad Company ought to have done; it is a question of you measuring what they did do by what another railroad company, under the same circumstances, would have done, that is the basis. There is the same basis for you to figure his conduct upon, and that is, did he do what an ordinarily prudent switchman under like circumstances would have done. You are not entitled to take your own whim, nor your own ideas and then stop, when you are finding whether or not Wagner was in the exercise of ordinary care for his own safety, but you must base it upon the standard of what another switchman would have done under the same circumstances. That is the only basis, and the court will tell you that is the law. When you are judging what the Alton Railroad did or did not do, you must judge it, not by what you think it might have done to avoid the accident, because we all know now; but the question is what would an ordinarily prudent person, under the circumstances do, that is, what would another railroad

company do. Now, there is the test that you must follow all through this case, you must use that as a basis.

Now, going back for one minute, after telling you these general principles; Mr. McShane starts out to abuse me, and the plea that is filed in this case, he starts out to abuse me first, and the plea
753 that is filed in this case, second; first, because, he said he stood up here and asked me if I claimed the Alton Railroad did not own that track,—a clear play to this jury, brazen on its face; he has no right to do it, and he ought not to have, but he tried to do it, in order to put me in bad in the eyes of this jury, right from the start, and he failed. I told Mr. McShane, not that we did not deny it, but I said "you will be required to prove it." The law requires them to prove it. We have filed a plea in this case, not under oath, a plea similar to that which he files when he files his declaration, and that is not under oath. It merely, gen[illegible]men, brings the issues together, it puts them on proof.

But did I have any reason to believe that the Alton Railroad did not own this track, where he was hurt? I have only to turn to Wagner's own signed statement, which will go to you to your jury room. He said he was hurt at a semaphore post while he was on the Western Indiana tracks. I had this before we ever filed our plea. Had I not a right to plead we did not own the track where he said he was struck, when he himself states that he was not on the Alton Railroad Company's track? Didn't they file suit against the Western Indiana first? Didn't they think the Western Indiana owned that track? Not only that, but today, this very minute, there is pending in this Circuit Court of this County, for $30,000, a suit by Wagner with McShane as his attorney, in which he charges that the Burlington Railroad, the Western Indiana, the Illinois Central and the Atchi-
son, Topeka & Santa Fe all operated and had control over the
754 track where he was hurt.

Now, who owns the track? Who does he claim or think owns it? If he fails in this case, as he said, he is going to try the next one, and get it out of every railroad company that did have something to do with those tracks and semaphores. That is why he begun a second suit, not because he knew who owned it, but because he knew that the Alton Railroad did not use that semaphore, did not place it there, and had nothing to do with its maintenance, and it is the semaphore that knocked his man off, and he has got another suit pending right where he has got the people who do own it, and who was controlling it, and was maintaining it at the time this man was hurt. No matter what your verdict is here, he is going to try the other case.

Mr. McSHANE: I object to that statement.

Mr. EVERETT: He has a right to. I withdraw the other statement.

Mr. McSHANE: I object. We are bound by this verdict, whatever it may be.

Mr. EVERETT: That is not the law.

Mr. McSHANE: If we fail on the proof—but having gone to issue here, we are bound.

Mr. EVERETT: That is not the law. He can proceed in that case

and go to judgment in it. That is the law, and he knows it. He can start on that case tomorrow, and try it, and go clear through and get a judgment against every railroad mentioned there, if he can prove it—and you know it.

Mr. McSHANE: If we can prove they own the track?

755 Mr. EVERETT: Yes, why do you say you cannot try the case? I say tomorrow, if that case is ready, he could go in there and try the case clear through and get a judgment against every railroad in there, if he had met the issues, and he could prove it. Just take this declaration to your room, gentlemen, and see what he has to say about who owned it. He calls them the other defendants," all but the Burlington. He says that:

(Mr. Everett thereupon read at length from the declaration filed in the other case as to the ownership of the tracks and semaphore.)

Now, he makes there the charge, you see, that it was their track, that "the other defendants" directed it and control-ed it, that they placed the semaphore there and maintained it and kept it there.

Mr. McSHANE: Now, we object to this kind of talk. It don't look like it is the right kind. Now, I will go in there with this man at two o'clock, in to the other court and dismiss that suit. I am going to do it anyhow, just to shut off his clap-trap. That has not anything to do with this case. He knows he cannot recover. At 2 o'clock, I shall dismiss that other suit, to head off this kind of foolish talk that will possibly lead somebody to believe we have some right in that suit. I will dismiss it at 2 o'clock.

Mr. EVERETT: I take an exception to every statement counsel has made since I ceased my argument, and ask the court to rule upon it as being highly improper.

—which remark of counsel for the plaintiff, the defendant, by its counsel, then and there duly excepted.

756 The COURT: That is highly improper. I think gentlemen, I think it is also highly improper for counsel to act in the manner they have acted here in the presence of the jury. I do not think that they should try to take advantage of the jury in making statements that are not to be borne out by what the law is. It is the law——

Mr. EVERETT: Does the court have any reference to any remark that I have made?

The COURT: It is the law that this man——

Mr. EVERETT: Just a minute. I object to the court stating the law verbally.

Mr. McSHANE: We will ask an instruction, in writing, on that.

Mr. EVERETT: Just a minute.

Mr. McSHANE: You are afraid to have him tell it orally.

Mr. EVERETT: I take another exception to that remark and ask the court to rule on it.

To which remark of counsel for plaintiff, the defendant, by its counsel, then and there duly excepted.

The COURT: The gentleman will proceed then, and confine himself to the record.

Mr. EVERETT: Will the court make a ruling on Mr. McShane's remark, where I made an objection, for the purpose of the record?

The COURT: The court never heard the remark, you may proceed.

Mr. EVERETT: I take an exception to the remark.

To which remark of counsel for plaintiff, the defendant by its counsel, then and there duly excepted.

757 Mr. EVERETT: Also to the failure of the court to rule. Also an exception to the failure of the court to rule.

Mr. MCSHANE: I withdraw any remarks that have been made.

Mr. EVERETT: In passing upon who owned the semaphore and track, we have introduced this in evidence, and it is before you, this document is before you, showing in another case what was claimed, in the form of a declaration which I have read to you, which you may take to your jury room, and I ask you to read it, especially the part that I have read to you, beginning on page two, from there down (indicating).

Mr. MCSHANE: I object to the statement that there is any evidence whatsoever, your Honor, that these other people owned the track. I object to that, and ask the court to rule that the declaration in the other case is not any evidence that these other people owned the track at all.

The COURT: The gentleman is entitled to draw any reasonable inferences.

Mr. MCSHANE: Yes, but——

The COURT (continuing): —from any of the evidence that may appear in this record, and he will so confine himself.

Mr. EVERETT: In addition to this, gentlemen, you may consider, when you go to your jury room, the statements made by Joseph Wagner, read by him, and signed by him, and dated by him January 5th, 1909, wherein he states, "I was going to the Erie yard, 51st street, via the Pennsylvania, with 5 Great Northern baggage cars, loaded with silk. When crossing the Western Indiana track, going to the Erie yards at 51st street, I was struck with a semaphore post on the Western Indiana tracks." You may consider that; you may consider the fact that he began this suit against the Western Indiana, and afterwards brought in the Alton; you may consider the fact that

758 he has now one pending against the Western Indiana. Therefore, I say, on all this I was justified in pleading, not under oath, but a mere formal plea, that the Alton Road did not own the track and the semaphore, and did not have any control over it. And all the effect of it was to make them prove it, as they have to prove every other part of the case, because we are considered innocent until proved guilty. That is what counsel is criticising me for doing in the face of all of this evidence, and the direct statement of their own plaintiff.

Now, the Alton Railroad is charged with having placed that semaphore there, in one count of the declaration; in another, with having negligently maintained it, or maintained the track in such a position that the semaphore was dangerous. That they must prove by the preponderance of the evidence. There is not one word of evidence in this case that the semaphore was ever owned, controlled or

under the management of the Alton Railroad, or that it has anything to do with track "B" on "Plaintiff's Exhibit A," which is the track where the controversy arises. This is the semaphore right here (indicating on photograph), and you will have that to take with you in your jury room. Here is the semaphore (indicating), and here is the track around here (indicating); this is the semaphore (indicating), and this is the track (indicating). You can all take it with you in your jury room, and examine it carefully. The testimony about that semaphore is, as borne out this morning by the man who had actual charge of it *is* that it belongs to the Chicago & Western Indiana, and has, since 1895, and if that is correct, it did at
759 any rate some number of years ago. The testimony of the man who checked the cars and was there every day was that it was their pole and it has been in that position for years; that he had never known of any other man being brushed off at that point. In judging whether or not the Alton Railroad is liable in this case, as I said before you haven't any right to say whether or not some change could have been made in that condition to have avoided the accident, that is not the theory; the theory you must go on is what would an ordinarily prudent railroad company, under similar circumstances do. Now, we see by this photograph (indicating), that they have telegraph poles and semaphore poles and bridges and other obstructions much closer than is shown on this photograph, or by actual measurement. In crossing that bridge, for instance, the clearance distance is only a few inches, less than a foot, I think ten inches is the distance the witness testified to. So along the whole system there are poles, telegraph poles and buildings and the structures all more or less near to the track.

In passing upon the liability of the Alton Railroad, you must say whether or not an ordinarily prudent railroad company would have taken that post away after it had been there from 1895 down to 1908, there never having been an accident, and while the trains were going by there every day, and many of them. Under those circumstances can you conscientiously say, any one of you, that the railroad company should have known that this man was going to be brushed off twelve or fifteen years later, when every day the track was being used? Now, that is the basis upon which you must find out whether or not this pole was negligently placed. In considering that, you must take into consideration the plaintiff's testimony. He told you it was his duty to look out for himself; that when they came to tracks where there was a switch and a straight track, that a
760 freight train would be liable to leave it so close that a man might be brushed off. He told you that in passing over the tracks and yards that frequently they came in contcat with buildings that were close to the track and also semaphore poles and other obstructions. So that then we must take into consideration, in addition to what other railroad companies would have done, what would a railroad company expect this man to do, knowing it was his duty to observe the conditions about him for his own safety. And he told you that on the witness stand, that it was his own business; But he did not have to tell us that, as there is not a man on this jury that

has not traveled on railroad trains, and that does not know that. We see obstructions, but we never appreciated before, perhaps, that a man who was required or did hang on the side of a car, had to use his own judgment, his own senses of sight and hearing, in going around and over freight cars.

But in passing upon the liability of this railroad company, you must take into consideration that they knew it was his duty to look out for his own safety. If that was the only post in the whole railroad yard or system, such as they have up there with eighteen or twenty tracks across, there might be another proposition presented to you, but it is not, there are many posts, there is obstruction after obstruction, as the plaintiff has told you, with cars and everything else, something is liable to happen at any minute. He says that he ran in a local yard here, that he was in the habit of going around Chicago, a yard with many curved tracks, as shown in one of these pictures, with track after track leading off from the main line,
761 any one of which tracks may be loaded with freight cars, any one of which may stick up so close to this main line that it barely clears it. He knew that, because he told me so from the witness stand. I asked the question and he told me. So that you don't have to find out whether he knew it or not, because he told you so. No, what he told you on this proposition, you are entitled to take as a fact.

In considering whether or not this railroad company was liable, you must consider where this man was riding. The evidence in the case is that when he rode from Harrison street down to this place where he got the signal, to go into this side track, he rode on the engine in a safe place, rode on the footboard. Why? Because he had to go through bridges, because he had to encounter railroad cars packed in on side tracks; because he had to encounter all of those things. He came down there, gentlemen, riding on the engine and got off and walked up and talked to the switch tender, and jumped on the center of this car. There was absolutely no reason for it. He was not control-ing the movements, or directing the movements of that train at that time. He was in charge of it as the conductor, and he placed a man at the head, which they always term the rear end, because the engine is always at the head, no matter which way it is going, that is merely railroad parlance. As we know it the head end is the end that is going ahead first. He had Coleman on the head end with the air hose. Did you hear him answer, see him dodge the question that Coleman could not give a signal. Of course, he could not give a signal, as we understand a signal, but he was drawing a fine, hair brea-th distinction between a signal with an air hose and signals they give with the hand. Finally I asked him the direct question: "When you say he could not give a signal,
762 you mean, when you say he could not give a signal, you mean he could not give it with his hand?" He said "Yes". "But didn't the air hose notify the engineer that you were about to stop, or they ought to stop?" "Yes." Yet he claims that he could give no signals.

So, I say, as he proceeded along, he had a man on the front, Cole-

man, who was watching out for signals, whose duty it was to do that, who, the whole train crew relied on to do that. They were not looking for signals from Wagner hanging on the side of the car, because the rear switchman was in between the cars, on tht footboard of the engine. The signal man was the man with the hose, air whistle and air hose. He could push it and stop that train or slow it down, or do what he pleased. So at that time Wagner had absolutely no business upon the side of this car.

Furthermore, he could have ridden on the front of the car if he had wanted to. This is in evidence, because I asked him the question. We had to send a telegram, to send for a gentleman by telegram to St. Paul, to bring him down—this appears in the evidence—to bring down the mechanical engineer to tell you that was a correct representation of the car that was in train on this track, upon which this man was riding when he got hurt. Why? Because his first witness that took the stand said he was standing on that truss, truss under the car, where you see one of the two, right there is the truss (indicating), the first witness said he was standing there. It looked like a rather dangerous place to stand with one foot there. He
763 said he was holding on to the hand-hold up here (indicating).

I can see a night conference between counsel, the two brainy counsel here, the plaintiff and the witness. "That will never do to hang on to anything like that." So next morning, in comes another witness, he said he was standing on a step. So they built the step there over night. Then they come on, the first man says here that he was standing—Coleman says he was standing on the stub-end of this car, on this part of it (indicating), he was standing on this stub-end, which was about 6 or 7 inches wide, which was absolutely true. But it would not do, and at this nocturnal conference, they said, "We have got to find something else than that, we have got to have something else than that." That was, because it was wide enough for Wagner to stand up there if he want- to, so the next man that comes in says "No, it was flush." Whoever saw a baggage car with no stub at all? We said no, but he said so, and swore to it, that he stood with his foot on the hand-hold, and with his arm up through the wheel up here. That is what the second day produced. So they had this car here, described in three or four or five different ways, and we telegraphed to the Great Northern and had them send down a man that knew, and he identified that (indicating) as a blue print of that car, and that will go with you to your jury room, and you will see that, and you can see that it does have a stub-end five or six or seven inches, as he says, and that it has got hand-holds there, where a man could stand and hold on, and that it has everything there, as he said. Another witness also stated that it had a door, and the second day he was followed by a witness who said there was no door—they had taken the door away, you see. We all heard that. Because I showed, when he said
764 that there was a door there, that it set back six inches, so the man had then merely one foot where he could have stood on that platform out there on that small platform, inside the door, if the door was closed, he would have merely one foot, or thirteen

inches. Then they took that door away, and they put on a witness to swear that there was no door there, so we bring down this man, and he told you that there was a door, and he is corroborated by the first plaintiff's witness in this case, and he says there was a door there, and that there was room enough for Wagner to have stood there. Further than that, he could have ridden on the engine. By the way, there has been only one loss of memory or concentration shown in this case by the plaintiff. The only time that Wagner has hesitated in making an answer to a question about anything was when I asked him couldn't he have ridden on the engine. It was nearly five minutes before he would answer that question, and he finally had to say "yes." He had ridden on the engine up to that point, and no explanation is given why he had to get off at that point to get on the car, because they had come all the way from Harrison street up here, through bridges and over tracks, by the signals of the semaphore men. He was not directing the train; he said he did not know the tracks; he did not know what switches to go over; that he depended on the semaphore men to turn the switches. He told you that. So that he could have sat in the engine and smoked his pipe until he got through with this delivery, so far as anything he had to do. He had already stationed a man on the front with an air hose to warn the engineer of either collisions or derailments or anything of that kind. What could he do hanging on the side of the car better than the man who was on the front? He could have stayed in the engine all of the way as he had done down to that point, because he had nothing to do; the semaphore men knew what switches to turn, knew what tracks he was to use going to the
765 Erie yard; and he said he did not know, and he told the truth. He did not know that. The word was passed when he left the yard that this train goes to the Erie and is to make connections over these roads, and at the semaphores the men got the signals and turned the switches without any signal from him whatever.

So that there is not one reason that can be advanced for the nevessity of this man's hanging on the side of the baggage car, that is to the truss, except that naturally these fellows do take chances—for what reason or why we don't know—until they come into court complaining somebody has been negligent, and they ought to be paid.

The COURT: Gentlemen of the jury, you will observe for your instructions the directions heretofore given you about talking about this case or attempting to make up your mind. Don't permit anybody to talk to you about it until after you have heard the instructions of the court, and then you may get together, and then, of course, you may talk among yourselves. Be in your places at 2 o'clock.

Whereupon court adjourned until 2 o'clock P. M. same day, Friday, May 19th, 1911.

FRIDAY, May 19th, 1911—2 o'clock P. M.

Court met pursuant to adjournment.
Present same as before.

Mr. EVERETT: I was discussing, gentlemen, when we closed, the proposition of the negligence of the defendant railroad company, and what that obligation was in law, and what its duty was in law.

You must keep in mind on that question that the Chicago
766 & Alton Railroad Company was not this man's employer; the only thing charged here is that they owned the track. A different rule of law applies where the employer is sued. An employer owes a duty to warn a man of danger that he cannot appreciate and cannot see; but that duty does not apply to a defendant who is not the employer. The only obligation the Alton Railroad Company owed here, if any at all was the use — ordinary and reasonable care in the construction and maintenance of its track. There is no evidence here that this injury was caused by anything defective in the construction of the track, nor that the Alton had anything to do with sending this car over there, or that it was in the management of the train, or had anything to do with the train. The only charge here is that we owned the track. All of these other obligations might be imposed upon the Burlington Railroad who was the employer of this man. An employer owes a duty of warning an employe of all those things, as I say; but this Alton railroad did not owe any such duty in this case; it owed only one thing and that was to use ordinary and reasonable care in the construction and maintenance of the railroad track that it owned. Now, on that proposition it appears that the semaphore pole belonged to the Western Indiana and was control-ed and maintained by it, built there and placed there. Notwithstanding the fact that in their declaration they have charged against us that we placed it there, that is not the fact, they do not claim it now, because the evidence shows that it was placed there by the Chicago & Western Indiana. Now, we had no right to go on to other people's property and tear down something; we have no right to go on to your property and tear down something that you built on your own property. But, supposing we had a right to do it,
767 they would have us take and move the railroad track. The presumption is that the railroad track was there before they ever put the semaphore there, and if that is so, then it is the Western Indiana's business to put the semaphore at a place that will be a safe distance from the track, and not the Alton Railroad. They cannot go and reconstruct the track, because some one who has a right to build something on his own property comes up close to it; suppose there had been a house there, suppose there had been trees there, we have no right to go on that property and touch a thing. The only thing we could do, as Mr. McShane could only claim, at most, would be to move our track after somebody else comes in and moves something else.

Now, it is conceded in this case we did not even own the land on which the track is built.

Mr. MCSHANE: That is not conceded or anything of the kind.

Mr. EVERETT: It is conceded that that property is a vacated street,

that it belongs to the city of Chicago, and that they vacated it as a public highway, and permitted railroad tracks to be built there. So we don't even own the land.

Now, compare the duty of an employer and the duty of a man who owns the track. If the employer sends a man over there, isn't it his duty to find out where he is sending him and not the man who happens to own it? That is the law. This is the law in reference to employer and employe. So that there is no claim of this kind, we did not have to make any warning to this man, that was his employer's duty.

768 Now, further evidence was offered this morning that this pole had been moved, but not one word of evidence, gentlemen, did they introduce to show what the distance is there between the railroad tracks and the semaphore at the present time, other than what we offered; and not one word of evidence that it was not the same on the day of this accident. He had his man here, why didn't he ask him? It was very probably and possible to move that semaphore as much as you wanted to and still have it the same distance from the track. That is the reason he did not ask the question.

Mr. McSHANE: You objected.

Mr. EVERETT (continuing): —because right today he knows that the semaphore is in the same relative position to the track that it has been for fifteen years, sixteen years, since 1895. He said we should know it is dangerous, he charges that in his declaration. How could we know it, when for sixteen years every day trains had passed that same place, over that same track, and not one man has been brushed off. How could we know it was dangerous? When you pass on that proposition, you must take into consideration, as I said this morning this railroad company had a right to assume that this switchman was obeying the obligations imposed on him to watch out himself and see for obstructions, because any minute, in a switching yard, as his train moves along he is apt to come on to something that is nearer to the track than is usual. They know that. That is part of their business, and in going along, past switch tracks and freight cars and buildings, they cannot have a man go along with them to point out and say look out for this and look out for that. That is no part of their business, as he said on the stand. He said they left it to him himself to look out for himself, and he always did it.

769 Now, there is an obligation on a railroad company to use ordinary and reasonable care, no higher degree than that, just ordinary and reasonable care, that kind of care is the care of the same kind that a railroad company, under similar circumstances, would have exercised. Now, then, if that is done, it doesn't make any difference how this man was injured it makes no difference whether this semaphore was right up against the track, if you find an ordinarily reasonable and prudent person under similar circumstances would have maintained that same kind of construction, then this defendant must have been found not guilty, notwithstanding the man was hurt, notwithstanding you may think that the sema-

phore was too close to the track, and that was the reason he was hurt. If you find that an ordinarily prudent person, or a similar kind of railroad company would have maintained the same thing, in view of the fact it had been there for fifteen years, and that for fifteen or sixteen years, every day, train after train went by there and nobody got hurt, and there was no reason to suppose anybody would be hurt that used ordinary care for his own safety, then how can you say that this railroad company is guilty of the negligence that they charge against it?

Now, we pass to the next proposition; they must prove our negligence before you can bring in a verdict of not guilty, and the next proposition is what care did he use for his own safety? He must exercise ordinary, reasonable care, taking into consideration all of the circumstances in the case, and that is a question for you gentlemen of the jury to pass upon, basing it upon the evidence and the same standard is there for you to follow on that. You must apply this evidence to this standard: What would an ordinarily prudent switchman do under like circumstances for his own safety?

770 No matter what this man did or what he did not do, you must fix it upon that one standard, after you find what he did, whether an ordinarily prudent man would have done it. Now, if you find that he was guilty of any negligence which caused this accident to himself, then he cannot recover, no matter how far that post was away from the track, because he must exercise ordinary, reasonable care, even though this defendant is guilty of negligence, and if he does not do so, then you must bring in a verdict of not guilty.

Now, let us see what he did. He was a switchman of many years' experience, nineteen years railroading, and a number of years as a switchman, absolutely familiar with all this part of Chicago where these railroad tracks are, because he went over them every day, going into the yards of almost every railroad company in Chicago. He told you, for instance, the conditions in each one of the districts; he told you of the fact of the obstruction of buildings and poles, telegraph poles and semaphore poles, and cars that would be up near the end of his track—that those things were at all times and at all places apt to occur at any time, and it was his business and his duty to look out for them.

Mr. McShane asked him on the witness stand: "Did any one tell you that that telegraph pole or this semaphore pole was near the track?" "No." On cross examination, I took him on that proposition, and I said "Did any man in your company ever tell you about any obstruction?" "No." Why, certainly not. The idea of asking such a question.

Then we followed that along and proved from his own mouth that it was his own business to look out for obstructions, his own business to look out for his own safety, and he did it.

771 Now, let us take it on this track, on this day coming down here, riding on the engine, a safe place, with Coleman on the front with the air signal, to guide the train and guard it from danger and notify the engineer if there is any danger of any

kind, and to stop, to regulate the speed of the train. We have next to the engine, between that and the first car, on the footboard, another switchman whose duty it was to give any signal that he might receive while he was there. Now, the train was being operated by telephonic or telegraphic communication from semaphore to semaphore. The first man had received notice where this train was to go, and he passed it along. Wagner himself says he did not know what tracks to go upon, he did not know what switches to turn. He relied entirely upon the semaphore people to work him over in to the track that he was supposed to go on, so as to get into the yard of the Erie Company finally. So he had absolutely nothing to do after the train was in motion. The lookout ahead was up there where he could best see the train and the dangers that the train was getting into. Wagner could see nothing from the side of the car that the man on the front could not have seen. He could not see as much. And he did not ride on the car until he got down to almost where this semaphore brushed him off; and he rode on the engine; but he choose to get on this car. How did he get on? Wasn't there a safe place on the car, even? I believe you are all convinced by this time that the preponderance of the evidence shows he could have stood on the front; that the law requires that there be a step on the front and a hand-hold there, and we produced the car inspector, who inspected these identical cars, all five of them, and produced his record, and he told you it was his business to examine these cars to see that they complied with the interstate commerce law; that one of the rules
772 was that they must have a step on the front of the car, a stirrup or a step, and this picture shows that it has one (indicating). He said that it had one. He don't remember this identical car, because he examined probably thousands of them a month, but he knew from his own record, that if it did not have it, he would have made a notation, and he produced that record before you, and there was no notation there that anything was missing in the way of safety appliances that are required by the national law. Therefore, you may take it as a fixed fact that this car was equipped in compliance with the law, and it had that step, and a witness testified it had a step; and it had a hand-hold and it had a brake wheel, and it had a stub-end there that a man could have stood on. But Wagner did not choose to stand on it, nor did he choose to stand back on the footboard where he said he could have stood. He choose to hang on the side of that car with his feet on the truss, a dangerous position, but whether it is or not, he assumed that position without anybody telling him, choose it at his own volition, and he had the right to choose where he would work, where he was to work on the car, he told you that, on the cross examination, he told you that, he told me on the cross examination that nobody told him any particular place to stand on the cars; that he had a right to go in the front end, on the engine footboards, between the cars, or on a freight car, he could get up on top; he himself selected the place where he was to ride.

Now, as this train approached there, there was no reason for him to be there. It was on a curve, or was getting on to a curve. He had a man in front with a signal. He had a man between the last

car and the engine on the footboard. He had the engineer. The engineer could just as well see from his side signals from in
773 front, from the front of the car, as he could see it from Wagner, because here, it is this way on a circle. Any time you are on the inside of the circle (indicating), you can see anything that is going on in there. I can best illustrate that by saying when you get to your jury room, you put yourself right in the center there, and make it a whole circle if you want to, and while you are in there, while you are inside, you can see anything that is going on inside of that circle. The only place you cannot see is on the outside. Imagine that this is the train coming along here, he could see this head man here (indicating), he could see any place around there (indicating), because he was on the inside of the circle. But, remember, gentlemen, they were relying, as a matter of fact, upon the signals that they were given by the head man with the air hose. But, better than that, gentlemen, and something that absolutely precludes any recovery in this case, no matter where the semaphore was, no matter whether we owned the track or not, no matter whether we were exercising care or not, there is one thing in this case that absolutely precludes his recovery, and the court will give you an instruction to that effect, probably, when he gives his instructions. That is this: That if the man was aware of the situation there, and appreciated the danger, he cannot recover. If he saw the situation there, and appreciated the danger, the plaintiff cannot recover.

Now, what is the fact? He told you that one hundred feet from this semaphore, he saw it. The day was light; the semaphore was painted white. But, nevertheless, never mind that, he saw it, that is fixed, because he told you he saw it; he told you it was on a curve, and that he could not judge the exact distance. He said he
774 thought it was five feet, or seven feet; he said both, gradually made it larger, but he said it was five feet at one time. Now, he had an opportunity of seeing that, as he approached it for that one hundred feet, and the engine was going from four to six miles an hour—and that brings us right to another proposition. Only one witness in this court has made it more than eight miles an hour, and that is the plaintiff himself, who, on the stand, said it was going fifteen miles an hour. That is absolutely rediculous. On that proposition, I ask you to look at the statements of these witnesses, who were the train crew, taken the day of the accident, made by themselves, nobody else made them for them, written in their own handwriting. Mr. Connell, who was one of the switchmen, said it was going six miles an hour—made before there was any lawsuit, made before they knew how seriously this man was injured—that is absolutely true—made in their own handwriting. They have testified, each one of them, that they knew more about it the day of the accident than they did the day that they were testifying almost three years later. Then we have Dorsey, W. W. Dorsey, dated the 15th day of December, the very date of this accident, and he says that they were going six miles an hour. He tries to make it eight on the witness stand. We have next Coleman, only other man in the train crew, and he has left it blank. But there is another fact to show

how fast that train was going, and it is not disputed in this case. When the brakeman back on the engine saw that Wagner had been brushed off, he signaled the engineer, and that train came to a stop when the second coach was half way *passed* the post. Now, Wagner was on the middle of the first coach. It stopped when the
775 middle of the second coach got opposite the post, so it gave it one car length. Now, in the meantime, the switchman was brushed off; the man at the end had to see him; he had to signal the engineer; the engineer had to apply his air. All that occurred, and notwithstanding that, they stopped that train within one car length. Now, was that train going fifteen miles an hour? Now, think of it, gentlemen, as bearing on what he should have done? The switchman himself, there he was, looking at this post. We know as a matter of common knowledge that when he got where he could see it,—he did see it, he says he saw it—then it was his duty to get off the train. The other switchmen say he had been able to jump off cars, they had seen him do it. But whether they said so or not, we know that they do do it, we all know it. Why, an ordinary street car goes along, somewhere around ten miles an hour, ordinarily, and we know people jump on and off of those cars. We know that switchmen, experienced in handling freight trains are required to get on and off going cars, moving cars. He had an opportunity, gentlemen, to get off of that car after he saw his predicament, and he did not do it. That is merely a matter of his misjudgment, and if it is merely a matter of his misjudgment, then why should this company be held for it, because he saw the danger? Any one knows that if you are crushed in between a semaphore post and a car, you are going to be hurt. So what could any company have told him? They could have told him that the post was too near the track. He knew that, because he found it out before the accident, he was right there and saw it. Now, of course, they could have told him "if you go in between there with your body on the side of the car, you are going to be crushed." But that is a matter of common knowledge.
776 You don't have to have any one tell you that, if you know the conditions, the conditions of the post and of the car. He was hanging on the car. He knew the post was there. So why did any one have to tell him you will be crushed? They did not, because that is a matter of common knowledge.

Now, either that man was inattentive, or he made a mistake of judgment, but there was nothing there anybody else could have told him about that he did not know already. If that is a fact, the court will tell you as a matter of law there can be no recovery in this case, and you must find him *not* guilty.

So I say, on the second proposition, of whether or not he exercised ordinary care for his own safety, when you have considered all of these circumstances, his experience, his knowledge acquired by passing around through the freight yards, his experience in jumping on and off freight cars; then, taking into consideration the fact he has told you he saw that post one hundred feet away; that he rode up to it—by the way, he rode up to it on a straight track. You see, as he came from the Pennsylvania there, through that bridge, it is an

absolutely straight track. You see when you examine these photographs, that this track here, here it is after it left this (indicating), this track here, this main track was absolutely straight, back here, so they came at it just like that (indicating), and the curve begins either right at or a little beyond that semaphore pole. In any event, the curve there has nothing to do with that, because it is not enough to make any difference. So far as hiding the view of the post is concerned, the post is on the inside of the curve, whatever curve
777 there is, and it was always in view, the same as shown on this other picture (indicating), the post is standing right there (indicating), and he saw it.

Now, I do not know what Mr. McShane is going to claim about this blue print, but the car numbers are mentioned above, and in three of these statements, all of them show that this man was on car 1664 Great Northern, and 1664 is mentioned above here (indicating), as being one of the cars that this is a plan of. A switchman, as a matter of common knowledge, always puts on his card, the car numbers in their rotation, beginning at the head end. The second car on his switching card here is 1664, which shows conclusively that that is the car that he was on. The statement that you see—he is trying to say it was 1665, but I do not know that that makes any difference—but it was 1664. The second car, which is shown right on his car- is 1664. This you will have in your jury room, and I wish you would look at it and see if it is not correct. So that this plan and specification is an actual plan and specification of 1664, the car that he was actually on. Now, the court will tell you as a matter of law, if he was injured by his own contributory negligence, he cannot recover. That means that he did something or failed to do something that he ought to have done to avoid this injury. That may be stated in the other way, as a proposition of law: If he failed to exercise ordinary care for his own safety, he cannot recover. It means the same thing either way that you take it. But on either proposition, if that is true in this case, then he cannot recover.

And I also want you to look at his statement again, when you get in your jury room, gentlemen, and see that he has stated that this accident happened on the Western Indiana, I want you to
778 notice that.

Now, we come to the question of the Relief Benefit Association. That is based on a proposition of law, and I anticipate the court will tell you this is the law, that is this: That where one of two or more joint tort feasors are released from a claim, it releases them all. That is the law. You have nothing to do with whether it is right or wrong, but simply to enforce it, as you have all said that you would. Now, what does that mean? It means simply this, in ordinary language, when a man is injured, and there are two or more persons liable for it, and the plaintiff could have sued both and recovered against them, if one of them settles and pays and gets a release in full for his damages, he cannot recover anything from anybody else, no matter how much he got from the first man. Now, that is the law.

Now, what is there in this case? The evidence is that he became

a member of the relief organization in 1902. He made his application—that you will take to your jury room—and signed it, and it provides this: "I also—" I have put a pencil mark here, so that you may readily get it—"I also agree that in consideration of the amount paid and to be paid by said company, that is the Burlington, for the maintenance of the Relief Department, and of the guarantee of said company of the payment of said benefits, the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims against the said company and all other companies associated therewith in the administration of the Relief Department for damages arising from or growing out of said injury."

Now, there he has released and satisfied his claim against the Burlington Railroad Company. The next proposition is:
779 Is the Alton Railroad Company also liable? I am assuming for the purpose of this argument that it is; in other words, we are liable, because, according to their statement—not admitting the fact, just for the purpose of bringing this before you—they claim the Alton Railroad is liable because they owned that track; they claim the Burlington is liable because the Burlington was his employer and failed to warn him of the dangers of the track. So that both of them, we will say, were liable. The are claiming that the Alton is, and we see readily that the Burlington would be if he sued them, and he has sued them in another suit. So that then if the law is that payment by one and a release and satisfaction taken, releases them all, then he is out of court, in this case, and your verdict must be not guilty. Now, if the court tells you that is the law, why then I expect you gentlemen to follow it, because you have all said that you would, without any prejudice or bias.

Now, what is the fact about that? This man entered this organization in 1902, and applied for the relief benefits. He was required to pay 75 cents a month as you will see, which he has paid up to the time that he applied for relief benefits as a switchman, which entitled him to higher reliefs. From that time he paid $3 a month, as shown, by his supplementary application. In joining that association or organization, he became subject to the rules and regulations, and we have presented to you the rules and regulations of the relief organization in operation March 4, and the one following in operation June 15th, which includes the time of his injury. We have his receipt here for the book of rules and regulations. He signed for it that he received it. He became subject to those
780 rules. I do not ask you to go through those rules and read them. It is too much, but I am going to tell you in a general way what it is.

The Chicago, Burlington & Quincy maintain a department called their Relief Department. Any employe of the railroad may become a member of that organization, subjecting himself to the rules and regulations, one of which was, if he accepts benefits, he releases that company from liability. The railroad company itself agrees to pay all of the deficits, even if there is not enough money to pay the claims, that is, if there is not enough money for the payment of money to those injured, the railroad company will make it up. The

railroad company also agrees, in these regulations, to pay the maintenance of the organization, doctors' bills, hospital bills and salary of the people who have charge of the organization. In fact, they keep it up and stand behind the organization. Now, it appears in evidence that in the year 1908, the Burlington Railroad Company paid in $81,000, in the year 1909, $78,000, in 1910, $85,000; that the organization received in 1908 from its men $500,000, approximately half a million of dollars; they paid out that year $540,000, paying $40,000 more than they received from the men. The next year the men paid in $545,000, and the company paid out about $575,000. This is on those benefits alone. In the year 1910, the men paid in $585,000, and the company paid out $650,000 for benefits. In addition to that, this company has stood the expense of the maintenance of that organization, has stood back of it, paid the men 4 per cent interest on all money the treasurer held on monthly balances, and has maintained that organization as a consideration for their release. Now, when this man is hurt, or any of them are hurt or get sick—they don't have to be hurt—if they are unable to
781 go to work from perhaps some disease that they contract that the company is not liable for at all—they are paid their benefits of $2 a day or $1 a day or just whatever it may be, according to the rules and regulations.

Now, this man was hurt, and he had an opportunity at that time of either suing the Burlington Railroad Company and not taking its benefits, or he had a right to take the benefits and release the company. Now, nobody had him by the throat. Nobody was asking him to do a thing. The benefit organization itself gave him the right to select which he wanted. But they said "If you take benefits from this organization that we are backing up, then you must release us." Gentlemen, the first check that was sent to this man for his benefit was dated January 5th, 1909 for $34, which was from December 15th to the 31st, seventeen days. He got $2 a day. That was on January 5th, 1909. Now, that check was held by him or was not cashed in the clearing house until June 9, 1909, a period of six months. He had six months to consider whether or not he wanted to release the Burlington and accept benefits for his entire life, or take a chance on a law suit against the Burlington or any other company, and he choose at that time, after six months' deliberation, to accept the checks. In the meantime, he had held the March check until October, the February check until August, the April check until October, and you can see right through that he deliberately held those checks for no other purpose than to consider whether or not he wanted to release the company and get benefits for the rest of his life.

Mr. McSHANE: For the rest of his life?

Mr. EVERETT: For the rest of his life. I think you heard what I said.

782 Mr. McSHANE: Well, you tell it as being true?

Mr. EVERETT: Yes, he gets benefits for the rest of his life, if he does not go to work. Do you want it again? Is that sufficient?

Now, this man, during this time has paid in—anything that hurts

McShane, why he cannot sit still, he has to jump, he gets nervous—this man has paid into this company from July to April, at 75 cents a month, and from April 1903 to December 1908 at the rate of $3 a month, he has paid in $213 during the entire time he has been a member of that organization. He has received from that organization on account of expenditures made on his behalf, $1,349.59, and he has received in actual money $1,231, making a total of $2,580.59. Now, can anything be more fair? Are you gentlemen going to put the stamp of disapproval upon the relief organizations that the large railroad companies, like the Burlington, the Baltimore & Ohio and the Pennsylvania maintain? It is for the benefit of the men. It is not a question of whether the railroad company hurts them or they get hurt while they are in their employ; it is if they are taken down, if they are stricken down with sickness, the railroad comes in and says "we will pay you, all you have to do is to put in $213, and we will pay you back $2,500, and continue to pay you until you are able to go to work.

Now, a question was asked Dr. Jack. "Well, why don't you tell him to go back to work, why don't you quit paying the sick benefits?" I will tell you why he does not: Because right at this minute, there is pending in the Circuit Court of Cook County a case against the Burlington Railroad, a case for $30,000. Are they going
783 to turn that man out? No. They have got an object in holding him there; they have got an object in paying him his dollar a day right now, and they will do it until that suit is out of the way. But that has nothing to do with the Alton Railroad. The only thing for you to pass on is whether or not the Alton Railroad gets the benefit of the law that says where two men are liable for an injury, and one pays for the case and gets a release, that the other is released also, because you cannot get payment twice for the one injury. The best evidence is just what this man said here "I accept these amounts paid me, and they shall operate as a release and satisfaction." Now, if you gentlemen are going to do as you said you were going to do, that is, act fairly towards the Alton Railroad Company, and follow the law that the court gives you, how can you, on the face of that, do anything else than return a verdict of not guilty? How can it be claimed that he has not released the Burlington Road from any and all damages arising out of his injury, and that he is to be receiving a dollar a day from that railroad and has received it right from the day he was hurt, beginning December 15th, as shown by his checks? That is another proposition of my defense, that there has been a payment to this man. We have also brought forward here all of the bills and vouchers that they have paid out, showing some thirteen hundred odd dollars. Mr. McShane has argued to you that this company can only win once, or this plaintiff can only win once; that is absolutely not true, and he knows it. He stood up here this morning and told it to you while I was arguing, the second time. He knows he can proceed in this other case until final judgment; that he can get a judgment against the Burlington, Santa Fe, the Illinois Central and the Chicago &
784 Western Indiana, as they have brought their suit to get it. So that it is unfair to say to you, and let you believe that this

is the only suit, that this is the only chance that this man has to recover, when he knows that is not true. He says to you this man admitted he saw the post. The first time he made the remark, he said he did not see the post, because that is the ordinary argument, when any one is hurt, for him to say "He did not see the post that hurt him, because the law is if he did see it, and appreciated the danger, he cannot recover. So he had to take that back, and admit that the man had testified on the witness stand that he had seen this post. But he says he did not know it would hurt him. He wanted some one to tell him "Mr. Wagner, now, you have seen that post; if your body is larger than the distance between the side of the car and the post, you are going to get caught." That is what he wanted somebody to warn him. There cannot be any other warning that they could give him. Now, that is a matter of common knowledge; nobody could tell him that and tell him something he did not know, because this very rule of self preservation that Mr. McShane is talking about it the one that would lead that man to know that if he tried to put his body, if it was two feet wide, through a foot and a half space, he would be crushed. So he has asked you to bring in a verdict against the Chicago & Alton Railroad Company, because his client did not know he would get caught between the sides, because he did not know that it was too narrow for him to get through. He was looking at it, hanging on the side of the car on a train going 6 miles an hour, and he was able to jump off, because he told you he could. I am not asking you to find that fact, because he
785 told you himself. There is no reason why you should say that man did not know what he was talking about, when he is here trying to prove up his case. He said he supposed it was the proper distance. Why, who knows it better than the man, when he is right there on the side of the car, looking at it, approaching it at the rate of four to six to eight miles an hour, with his eyes on it. He said he was looking for a signal. What signal was he looking for? He could not find any. Finally his eyes strike a little signal. What do they call that? Oh, Potts signal, Potts signal. He finds a little Potts signal off in the distance here. Did that have anything to do with the operation of this track?" "I don't know." What do you think of a Conductor of a railroad train, going over a railroad track and not knowing what signals applied to his track? Do you believe it? He knew as well as he knows anything, gentlemen, that the Potts signal did not have anything to do with his track. He knew, gentlemen, when I asked the question that there was not a signal there that this semaphore had nothing to do with it, that it regulated the through tracks there. There was not a signal anywhere around there that applied to that track, and he was not looking for any. If he was, he would not be standing on the side of the car, the man up forward with the air hose was the one to look for that. He was in the best position. But better than that, he told you he did not know what track to go on, he was not paying any attention to it; he was depending upon the men in the tower to send him there, from track to track and over switch after switch. So when he told you his attention was distracted on some other occasion, that he was watch-

ing for signals, he told you what was not true, and you know it was not true, because there was nothing for him to look out for.
786 He just carelessly got up on the side of the baggage car, and when he got up there, he could look forward here, clear around the head of his train, and he could see the track ahead, but he could not give any signal from there, as they were depending upon the air signal.

Now, Mr. McShane said he was hanging on the side of the train, watching for signals, for all kinds of signals, on all kinds of tracks. That is absolutely disputed. But if he was such an intelligent, wide awake man, and was looking out for signals and everything else, why couldn't he see the post about sixteen feet high and about ten inches square. Now, he can see a little signal down here on the ground, about a foot high, that looks like a little mound, not a foot high; yet, he cannot see a semaphore, showing out in the distance there, just as that does in that photograph. He wants you to believe that, and you will have to believe it before you can bring in a verdict. You will have to believe it before you can bring in a verdict. He told you that, and it is right, before you can bring in a verdict, you must believe it.

Gentlemen of the jury, before you can bring in a verdict here, you have got to say that he either did not see that post (he has told you he did see that) or that he did not appreciate the danger (although he told you that he did). He told you, gentlemen, that he thought he could get by, so he must have appreciated the danger. He said when he was about five feet away from that post he was pulling himself in.

That is their own evidence, gentlemen of the jury, when he was five feet away from that post, and looking at it, he was pull-
787 ing himself in to the car, trying to dodge it. Would an ordinarily prudent person, watching out for his own safety do that, or would he drop off of that car? That is the test. He saw it; he saw it five feet from the post, and tried to pull himself in. He saw it one hundred feet away; it is evident he saw it all the way from here (indicating on photograph), as he was on a straight track, until he got beyond this point, when there was a curve; that is the first time that it started to curve.

Now, gentlemen, I am not going to bother any more about this case. My time is about up. I have presented every phase of this case that I could think of. I don't want you to think that I am here not trying to take advantage of every point that I can. I am defending this case, this suit for the Alton Railroad, with all my might and main, and I intend to make objections every time they will benefit that company, because I feel that company is not morally or legally obligated for this man's damage. I feel that you want to have this case presented the same as any man that has a lawsuit tried does; he wants his interests looked after, and looked after strenuously, and if McShane thinks I am here to let him slip things over, he is mistaken. I want you to understand that I do make objections, and when I make them I want them to be sustained if they can be. I am not here as a dummy sitting here; I am here as a lawyer for the

Chicago & Alton Railroad Company, and I intend to fight, and fight until the end. I want you to understand that is why I am making these objections. I ask you to bring in a verdict of not guilty.

I thank you, gentlemen.

788 *Closing Argument of Mr. McShane.*

If the court please, and gentlemen of the jury: The average man would rather think that when a man was injured in the service of his employer, through that employer's negligence, that he ought to pay for it, but you have got some little inkling of the hurdles that a man must jump from the time of his injury until the time that he gets compensation for it.

This gentlemen here—"take advantage of all points," yes—yet, do you know, I think that his talk to you men is rather an insult to your intelligence. Now, for instance, here is this man's observation. What did he tell you about why the lawyers did not tell the truth about the ownership of the track? He said "Why, we had Wagner's statement of it, and we have this other suit, in which he said this other company owned the track, and that is why." Now, you know his plea was filed a year or pretty near two years before that other suit was brought; you know that it was filed almost two years before. In his plea, he said—now, giving you his reasons as an honest man—he says he is, I think he did, I am not sure about it, but he sort of hinted that he was—along in October 1908, his company filed this plea; they filed a general plea "now, comes the defendant, and says that it is not guilty in manner and form as charged in the declaration." That is what we call a general denial. But they did not stop there, they went on to say: "And as a further plea in this behalf, said defendant says that the plaintiff ought not to have his aforesaid action against the said defendant, because it says it did not own, possess or
789 operate at the time complained of in the declaration, and does not now own, possess or operate said railroad track or semaphore."

Now, he says that they said this, because we charged in the other suit that other companies owned it. The other suit was not filed for a year or more after this. He says again—isn't that a child's play, gentlemen, don't he almost act as though you were children, when he tells you that story. Now, he says, "Why Joseph Wagner says it was the Chicago & Western Indiana track." From that, hadn't we the right to suppose we don't own it?" Therefore, he comes in as an officer of this court, and tells this court and jury, "we don't own the track."

And now, do you suppose for one instant, gentlemen of the jury, that this company relied on Wagner's statement made to the claim agent of the C. B. & Q., that they probably never saw, until this case had come on for trial? Do you suppose that they relied upon it to determine whether or not they owned that track? Their engineer spoke about the maps in his department. Their trackmen knew of the track, and took care of it. They charged for

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every car that went over it, and have done so for years and years. Now, do you believe it is true, do you believe that this man is telling you the truth and is fair with you when he tries to pretend that it was because we charged in that other suit that somebody else owned it, that therefore, he thought that they were not guilty? Now, do you think that that is fair, do you think that is fair to Wagner?

Now, you know that this man is in a bad way; this means all his life to him; now, if they beat him, beat him fair. I say it is not fair. You know, every man with an ounce of sense knows they did not put that plea in there, because Wagner two years
790 hence would file a suit, in which he would state that somebody else owned it, or because he said the Western Indiana owned it. They put it in there, because they thought poor Wagner did not know, and they objected to it here, and made him prove, step by step, hoping, hoping that in some way the poor fellow would be unable to prove the truth, and thereby, this Godly, moral crowd would escape. Do you believe he is fair with you? You believe he is not insulting your intelligence by saying that. If you believe he is fair with you, if you believe he is not insulting your intelligence in making that kind of an argument, I don't know anything about it.

Now, about this release, for just a moment. It is not in this case, just like the other suit is not—let me say, in passing, about the other suit——

Mr. EVERETT: Just a minute.

Mr. MCSHANE (continuing): —about that other suit, I think the court will tell you that the charge in that other suit, that these various companies owned that track, should not be regarded by you as proving or tending to prove whether the Alton was or was not the owner of the track in this case. I have taken the pains, because he made that statement, to ask an instruction, and I think the court will give it. The instruction, in other words is that the suit has nothing to do with it, the other suit has nothing to do with it, and he, as a lawyer, knows it.

Another thing, he has led you to believe, I think unlawyer like, led you to believe that Wagner could recover here, and then could recover from the other people. I have asked the court to instruct you that if Wagner recovered judgment in this case, and it
791 is paid, that is the end of it; he cannot recover from any other person in this world.

Mr. EVERETT: I object to the statement that he has asked the court for certain instructions, and that the court is going to give them.

Mr. MCSHANE: No, I said——

Mr. EVERETT: Wait a minute, that is improper. The court gives the instruction, neither counsel gives the instructions.

Mr. MCSHANE: The court instructs the jury, not the lawyers.

Mr. EVERETT: Wait a minute until I get my objection stated. I say that is an improper statement. I have objected to it on that ground.

The COURT: Well, counsel will confine himself——

Mr. MCSHANE: Yes.

The COURT (continuing): —to strictly legal argument.

Mr. EVERETT: I take an exception to that.

To which remark of counsel for plaintiff, the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE: The court gives the instruction, and there is—I apprehend that he will tell you that all there is about that is that if this man recovers here that is the end of it; that he cannot go arbitrarily—and he knows it—that the plaintiff cannot recover from anybody else if he recovers here. I apprehend that every lawyer who knows enough to come in out of the rain, knows that is true; I likewise apprehend that when a lawyer tells a jury that, he tries to confuse them, he is throwing dust in their eyes, trying to mislead them, in that this plaintiff can recover in some other court if he recovers here.

792 Mr. EVERETT: I take an exception to the statement. It is not a correct statement of the law, that there may be no more than one recovery in an action of this kind, from different people; I insist that he is misstating the law.

The COURT: The court has stated that the jury will be bound by the law, as given to them by the court——

Mr. MCSHANE: Now——

The COURT: Just a minute.

Mr. MCSHANE: Excuse me.

The COURT: So far as what the lawyers say, as to what the law is, the court cannot control what the lawyers will say is the law.

Mr. EVERETT: I take exception to his remark.

To which remark of counsel for plaintiff, the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE: Supposing in that other suit, gentlemen, supposing we should go tomorrow in that other suit, if we have the right, what must we do, what must we show? We must prove what? What we charge, namely, that these other roads own the track. Now, we have included half a dozen of them; they did not all own the track. We know they did not all own the track, but we wanted to get the right one. Now, after proving, as we did here, that the Alton did own the track, how could we possibly hope to recover against anybody else, because this same proof introduced here, disproves that anybody else owned the track. You knew the Alton owned the track, not a syllable of evidence to the contrary. Poor Wagner's notion is not evidence, that they did now own the track.

793 Mr. EVERETT: I object to the designation of his plaintiff as "poor Wagner," as improper.

Mr. MCSHANE: Well, rich Wagner.

Mr. EVERETT: I ask a ruling on it.

The COURT: Yes, there is no evidence here to base the statement on. You should confine yourself to the record.

Mr. EVERETT: Exception to his remark.

To which remark of counsel for plaintiff, the defendant, by its counsel, then and there duly excepted.

Mr. McSHANE: I do not mean financial standing. I do not know what it is. It is not important in this case.

"Now, about this release, which is in keeping with the rest of the stuff that he has been giving you. I say this release hasn't anything more to do with this case than that declaration in the other suit, not a particle." Here is a contract which this man made with the Burlington Relief Department, as a result of which, he, and all the rest of the men paid out of their earnings so much under an agreement—that if he and the rest of the men will pay out of their earnings so much, the company will pay a pittance, too, very little. But he agrees beyond that. He agrees, if he accepts this benefit, he will do what? He will release the C. B. & Q. Railroad, and those companies affiliated in the relief department, not the Alton. I showed by this man that the Alton was never affiliated, only——

Mr. EVERETT: I object to that statement as not a correct statement of the law, and as misleading and made for the purpose of misleading this jury. The statement I object to is the statement
794 that he made that the release of one joint tort feazor does not release all.

Mr. McSHANE: He has made his argument, I hope.

Mr. EVERETT: You have got to stay within reasonable bounds of the correct statement of the law.

The COURT: As the court said, there is no method by which the court can compel any counsel to make a correct statement of the law. If I did, I would be very glad to know it; I would take advantage of it both ways.

Mr. EVERETT: Then I ask the court to—the court does not rule on this objection to the remarks of counsel?

The COURT: I have no way to rule on it.

Mr. EVERETT: I take an exception to his remarks.

To which remarks of counsel for plaintiff, the defendant, by its counsel, then and there duly excepted.

Mr. McSHANE: I say what did this man do? He made a contract with this Burlington Relief Department that he would—that his acceptance of the money, of this insurance, would release the C. B. & Q. and the companies affiliated in the relief department, not the Alton Railroad. That was his contract. Now, I say the Alton hasn't anything to do with that in any way, shape or form. It is utterly foreign to this case. It hasn't a thing to do with it in the world. Now, here are two reasons why. Suppose that this release was binding as to the Burlington Relief Department, and is not binding as to the Burlington Railroad. "He said "don't put your stamp of disapproval on this kind of a contract." It is not necessary, others have put their stamp of disapproval on this kind of a contract, which is illegal, contrary to public policy and
795 void as to the Burlington Road that this man was engaged in Interstate Commerce when this thing happened.

By the way, right in that connection, I have asked the court to ask you a special finding, and it is this:

"Do you find from the evidence that on December 15th, 1908, Chicago, Burlington & Quincy Railroad Company was engaged in Interstate commerce between two or more states, and that plaintiff was injured while employed by it in such commerce? Answer yes or no."

Everybody says the Burlington is an interstate commerce road, and runs between this state and other states. Was this man engaged in interstate commerce? What is interstate commerce? It is the movement of traffic between states. Were those cars that this man was working on, engaged in connection with interstate commerce, were they being moved between states? Certainly, of course, they were. The proof is positive here that the seal of the Great Northern road was on the cars, a road that does not come within a thousand miles—five hundred miles at least of Chicago. Sealed there. Going where? Going to the principal points—we have shown there that was for New York. This man, like a hundred other men, perhaps, was helping it along; every man would have to do his part; every man did it in turn, and every man while engaged in the movement of this train was necessarily engaged in interstate commerce. This question was asked to define that. That will settle that. If this road was engaged in interstate commerce—you know it was; if those cars were engaged in interstate commerce, or even beyond that, if this man's regular work was in connection with interstate traffic it is the same—that is why I asked him "what is the majority of the cars that you handle?" Interstate cars, as you know,
796 move on way-bills—if he was engaged in the interstate service at all, the stamp of disapproval has been put on that beautiful scheme whereby men in advance—a man goes to the Burlington office and asks for a job, say a job switching, and they put that (indicating) at him.

Mr. EVERETT: I object to that statement. There is no such evidence in the case. The evidence is that it is a voluntary association of the men, that the men voluntarily become members of it or not as they see fit. There is no evidence that anybody threw that at this man.

The COURT: The jury heard what the witnesses said.

Mr. EVERETT: I except to his remark.

To which remarks of counsel for plaintiff, the defendant by its counsel, then and there duly excepted.

Mr. MCSHANE: He is bound by every word of it. He don't ask to be excused from a line in there. I say don't carry it beyond what its terms imply. Its terms at most, say that he agrees, by accepting these benefits, to release the C. B. & Q." As I say, if he was engaged in interstate commerce, the Congress of the United States says, "no, you can't do it, you can't do it, that kind of a contract is illegal and void, as contrary to good conscience and public policy. If he was engaged in interstate commerce, that will not release it.

But, supposing he was not, it has nothing to do with this case, because if it is a case between the C. B. & Q. and this man, and

there was no act of Congress, then he would be bound by that language. But, as I say act of Congress or no act of Congress, no one can take advantage of that thing, except those who are parties to it; it did not mean Wagner and the other men who worked on that road were releasing the whole world from all fault.

797 It means, at most—it is, carrying it to the extreme end, that far, it means, at most, that when they get these sick benefits of fifteen or twenty dollars, lying in a hospital on a bed of pain, when they get that, at most, it releases the company, not everybody else.

You will notice, in these checks, they don't say a thing about release, they don't say a thing about release, innocent enough; almost like a ministering angel this check comes, but when the man takes it, whether he knows its effect or not, under this beautiful plan, he is out. But as I say, the law stepped in and said "no, no, you cannot do that."

So I say for two reasons this is not in this case:

First, because it is interstate commerce; and second, because these people are not parties to it.

In that same connection, I think the court will tell you they are not entitled to any credit whatsoever, not for a penny in this suit, because of what this man received from his comrades, his comrades, not anybody else, but his comrades. This railroad paid but a trifle towards the money that has been given to this man.

Now, he says that they were not guilty of negligence. In that connection, I think, he has misquoted the evidence shamefully. He said this—he said this evidence showed that this post was the usual distance apart—you know I tried to show by Wagner, I asked him about the customary clearance, and he objected, and I said——.

Mr. EVERETT: I object to discussing evidence that is not in the case.

Mr. MCSHANE: I am not discussing evidence that is not in the case.

Mr. EVERETT: You are discussing things that the court

798 ruled out.

Mr. MCSHANE: No, I said "what is your objection?"

Mr. EVERETT: Let us have a ruling.

Mr. MCSHANE: Wait until I make the statement.

Mr. EVERETT: You have made enough of it already for me to object to, that I would not let you, that I made an objection that the evidence should not go in; that is improper.

Mr. MCSHANE: I am not complaining of that, I am——

Mr. EVERETT: I am complaining of the fact that you made a statement of that kind.

The COURT: The gentlemen will confine himself to the evidence.

Mr. MCSHANE: I am, your Honor.

The COURT (Continuing:)—that is in the record.

Mr. EVERETT: Exception to remarks.

To which remarks of counsel for plaintiff, the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE: I am, nothing else. I say that we did not go

into that thing, about how others were constructed, because—why? He said that the only question is how was this, what was the distance between this post and the car. So it is for all of us, that is the question for all of us, how was this one constructed, now how others were constructed. He said "The only question is how was this constructed, what was the distance between this post and the car? Was this safe? Not how others were constructed." I said, "amen." That is the question in this case. For that very reason, when he asked this man about how some others were in the usual course of business and so forth, I objected, and the court sustained the objection. There is no evidence in this case about
799 whether this was the usual clearance or not; the only thing is this; he asked his engineer was 2 feet and 3 inches, which the engineer said was the clearance between this car and the post at this time, was that the usual clearance? I said "I object," and the court sustained the objection. Supposing two feet three inches was the usual clearance, that it is nine inches farther away, nine inches farther than that pole was from the car when Wagner was crushed between the pole and the side of the car. Rea said he made the measurement of the distance between the pole and the track, and that it was four feet three inches. This man who measured it the other day said it was back now five feet. Nine inches difference. A baggage car, he said, overhangs the track, two feet nine inches. In other words, at the time this man was hurt, it was eighteen inches from the side of the car to the pole, at the end of the car. Now, it is nine inches farther, and he wanted to prove that this nine inches further was the regular clearance. Supposing that he had succeeded. By his own evidence, the pole was nine inches closer than the regular clearance for poles of that kind, nine inches closer. I asked the engineer how far was that pole from that frog. 53 feet he said. You already have a report here that at the time Rea measured it, it was 46 or 47 feet, six feet closer.

There is no evidence in this case, gentlemen of the jury, that this pole was as far away as other poles; there is not any evidence whether it was or whether it was not. The law is, you must determine from the evidence of this pole itself, whether it was safe or unsafe, and I say that counsel did not tell the truth, he did not correctly quote this evidence, when he said that Wagner
800 said that this pole was the same distance as the other that Wagner said, and others said that this pole was the same distance as others. They said just the reverse. In coming down there, in so far as he can judge about that, he said these other things were further away.

Now, was it safe? He said they did not put the pole there, but it makes no difference whether they put the pole there, or whether they did not put the pole there. He said the Western Indiana had a right to put it on its own property. There is no evidence in this case that this pole was upon the property of the Western Indiana at all. The Western Indiana, as Van Hook said operates a joint system of signals, joint. How the other companies may compensate the Western Indiana, we don't know, but this joint system of

signals protects three tracks in addition to that of the Chicago & Alton Road, protects the Pennsylvania, protects all those companies. The Western Indiana don't own all of those. They control these signals. As I say what the arrangement is between the companies and them is not important in this case. But it is not in this case that this pole was on the ground of the Western Indiana road. The evidence in this case is that this one track—that is, nobody said that the Alton owned it—but everything tends to show that the Alton owned this track. And, right in that connection, let me call your attention to something else. This curved track (indicating on photograph) is the track in question. Mr. Everett had the C. & A. switchman testify that he also took care of that track (indicating on photograph), on the other side of the pole, which he marked "D." In other words, on that showing, the C. & A. took care of the tracks on both sides of this pole, and the natural infer-
801 ence from that would be that both tracks were theirs, and the ground between the pole and that, their ground, and nobody's else ground. The ownership of the pole is not important.

And let me call your attention to this further, in the original declaration. The original declaration charged what? It charged that this road negligently caused or permitted the pole to be placed there, and it further charges that it negligently permitted it to remain there. Now, I filed additional counts in this case. I thought that this man would say "oh, well, go to the jury; why, he alleges that they put it there; now, you say they did not put it there," in other words, the allegations were more than is necessary. I filed additional counts in this case, which merely charged this, without any reference to who put it there, it does not refer to that at all; it says that the plaintiff alleges that long prior to the time in question, there was a certain semaphore or signal post placed alongside of the track that was close to the defendant's said track; that said post was likely and liable to crush switchmen against or knock them from the side of the car while being operated upon said track past that pole. I have not said that they placed it there or even permitted it. And the defendant wrongfully and negligently permitted what? I said that they had permitted the track and pole, or post to remain in such close proximity from thence to the time of the accident. That does not say who owned or who did not own. It was not necessary. It was not important. In that count, I got down to the things that were necessary to prove, namely, that that dangerous condition was there, and that they negligently permitted it to remain there from thence until the time of the accident. That is all that
802 is important in this case. The second count does not even charge that; it charges that it was there, and that it was dangerous; it does not charge that there was negligence in that, but it charges that it was their duty to have warned this man of his danger when they let him in upon that track, and this other count the same way.

Why, he says, the C. B. & Q. was liable for sending this man over there. The C. B. & Q. would be liable, if liable at all, only because they are chargeable in law with the negligence of this company.

This company maintained that track and furnished this pole, provided that for these other roads; and if they did it dangerously, perhaps the employer of the men would be liable, too, but it would not be because the Burlington did anything wrong, but simply, because in law, the Burlington might be charged with the fault of the Chicago & Alton. I am not going to waste much more time on that, gentlemen of the jury. Now, on the question of this man's care: Now, he rode down there on the head-end of the engine. The engine was going to back up, and he was on the tank end of the engine, that is, he was in front, as they went south, and when they went north, he would be at the rear end, so when that engine reversed its motion, he got on the side of the car. Now, you would ordinarily think that there was nothing wrong about that. He said why didn't he get on the end of the car? Well, there was one man on the end of the car already. That man could not give any signals. Suppose he should want to stop the train, suppose he stopped it, could he signal anybody riding on the end? Now, this man was in charge of the men and the engine; he was responsible for the movement of the whole train. This other man occupied all the space that there was. He said that there is a little step, and
803 this diagram, if correct, shows a little step at the corner. Here is the car coming this way (indicating) and here is the step, and there is one man on that step, standing of this corner (indicating). Suppose two men get around in there (indicating). Here is the step (indicating), what good will it do to look when he is here (indicating). He is going to look that way (indicating). Can he, by some contortion, stand around in this way and look or if he is going to signal to the engineer back of him, wouldn't that position be infinitely more dangerous? If he fell, he would be ground under the wheels. Wasn't the position on the side of the car infinitely the safer one? He stood there where he could see. It was his duty to look ahead; it was his duty to look to the rear; he was in the right place. There is no evidence in this case that tends to show he was not in the proper position, in his proper position. Now, then, when he was in that position, as I say, he had a right to suppose that that post was a proper distance from the track. He saw it. This pole was fastened so that—those poles are fastened at such distance so that these men, as they see them, every day of their lives, pay no particular attention to them. They take it for granted as they must, that a pole is a proper distance from the car. Now, here it goes around there (indicating on photograph). This man was looking down amid this net work of strange tracks. He did not know which one his car was going on; he was looking ahead, in charge there, in a new field, a new situation. Are you going to say that an ordinarily prudent switchman, in such a situation might not discover the undue proximity of that pole, without being guilty of negligence? Wagner did not discover. He is the only one that we know of that was in that place, or in any way was placed
804 in that connection that way. Talk about that track being safe. Sixteen years he said nobody was ever hurt. Not a bit of evidence about that. One man only was asked on that ques-

tion, and all he said—Allen, I think it was—all he said was that he never heard of anybody being hurt there, but he didn't hear of Wagner's injury, he only said when he was put on the other day that he had heard something about a Burlington man being injured on the track, but he didn't know what or where, didn't even hear about this man; he worked there a year or so off and on, and so these other men, also. All the evidence there is in this case, about anybody else being hurt on that track so far as these men were concerned, is that there may have been many hurt, there may have been. It was not a proper matter to prove. We did not go into it. They did not go into it. It is not right for him to draw the conclusion, because one man did not happen to know of but one case in the year, that hence, there had been no occasion of that kind for sixteen years. I do not see how they could run sixteen days hardly, with that awful trap there, without somebody being caught. You don't know how close many and many a man may have been, may have come to injury or death at that pole. You do not know how many men may have just got in in time, or the car may have been narrow, or something of that kind, you don't know that." All you know is that there was a pole standing there that came so close to the car that it crushed this man between the side of the car, and had it not been for the recess in the door, where he got his head and upper part of his body in, he would have been killed.

Mr. EVERETT: I take an exception to the remark.

To which remark of counsel for plaintiff, the defendant, by its counsel, then and there duly excepted.

805 Mr. MCSHANE: That is all we know about it.

Mr. EVERETT: I take an exception to the remark that if he had not got his body in, he would be killed.

The COURT: Preserve the exception.

Mr. EVERETT: Well, I want a ruling.

The COURT: Well,——

Mr. MCSHANE: It is an inference.

Mr. EVERETT: Just a minute, will you wait?

The COURT: It is an inference which may or may not be a reasonable inference.

Mr. EVERETT: I take an exception to the remark.

To which remark of counsel for plaintiff, the defendant, by its counsel, then and there duly excepted.

Mr. MCSHANE: I do not know what would have happened, or what would not have happened, but it is a mightly lucky thing for him that there was a six inch opening, because he got in there the part of his body over that part that got crushed.

What is the difference whether he stood on the stirrup, or whether he stood on the step. You know he stood there some place, or his pelvis could not be crushed and his bladder torn, unless he was there. What is the difference whether he stood on the stirrup or stood on the step? He stood where a man had a right to hold on. He held on to a handle put there for a man to hold on to. It was the best, so far as he could see, and if it had not been for this post, it would have been the safest place, he could have occupied on that train.

Now, gentlemen of the jury, so far as the question of this man's care is concerned, he says that you have—he says it was his duty to look out for this. He meant, of course, nothing more
806 than it is every man's duty to exercise ordinary care for his own safety in doing his work, but a man has many things to do beside watching out for his own safety, he has got many grave responsibilities. I will leave that. I do not think—with all candor—that it is for you twelve men to say, as he asks you to say,—sitting in a position of absolute security, unfamiliar with this class of work, passing upon the conduct of a man who had everything in the world at stake—I say that it is asking a good deal, that it is asking a whole lot of you to say that you know that no ordinarily prudent man would have failed to discover this trap until he had crashed into it. He did not discover it in time, you know, and, as I stated to you, any ordinarily prudent man might have fallen fatigued as he did.

On the question of his injuries——

Mr. EVERETT: I object to any discussion, in reply, on the injuries. I did not make any answer to it before. He is confined now to replying to what I advanced in my argument. I have eliminated the question of injuries and damages. I did not make any answer to his original argument on that proposition.

Mr. MCSHANE: I do not think that necessarily follows, your Honor.

Mr. EVERETT: It necessarily does, necessarily follows.

Mr. MCSHANE: I don't think it does.

Mr. EVERETT: You are only entitled to reply to me.

Mr. MCSHANE: I divided up my time, I merely took part of my time.

Mr. EVERETT: You made your opening.

Mr. MCSHANE: I opened enough. If I had not mentioned the subject at all, then there might be some force to your ob-
807 jection.

Mr. MCSHANE: That don't make any difference. You are replying now to what I said. I avoided discussing both of those topics. He argued them on his original argument, and argued them fully.

Mr. MCSHANE: No, I did not.

Mr. EVERETT: I did not mention them; he is bound in reply to what I said.

Mr. MCSHANE: It has been my understanding that I might only, in the opening, outline all of the subjects, that one might outline all of the subjects, and if they omit a subject, they have no right to reply, have no right to refer to that in reply. Now, I did not omit it, I mentioned it for that very reason, so he could not get in any of this clap-trap.

Mr. EVERETT: Let me address the court, if you have finished.

Mr. MCSHANE: Go ahead.

Mr. EVERETT: He had waived his argument, and had said "I waive my argument," and I had said "I waive my argument," there would have been no answer, and the case would have gone to the jury without any argument, and I think it is right on that theory, that

there is nothing for him to answer, in reply. Now, he is in the same position, on the subject of injuries and damages. He made his statement and argued that proposition to the jury on his original argument; I made no answer to it, so there is nothing for him to reply to me in regard to *on* that proposition.

The COURT: The objection will be overruled.

Mr. EVERETT: Exception.

To which ruling of the court, the defendant, by its counsel,
808 then and there duly excepted.

Mr. MCSHANE: Now, I say to you gentlemen of the jury, he does not make any reply on the question of damages; there is not any reply that a man could make. This man's condition, he has told you of, and his doctors have told you of his condition, beyond question, is a condition, so far as lameness and the position of his hip and bladder is concerned, those are permanent conditions. His nerves may improve, I do not know whether they will or not; these doctors don't know. Nerve trouble, when there is no injury at all, may last for years and years. But so far, all we know is that two years and five months have gone by, and during all of this time this man has been totally incapacitated from labor of any kind. As to the Relief benefits, he gets this dollar a day only when he is totally incapacitated from any kind of labor, that is all.

Now, this is a serious problem gentlemen. You are as well able to pass on this question as the Supreme Court of the United States. There is nothing in legal training that enables a lawyer or a Judge to arrive at any more correct conclusion as to how much compensation a man should be awarded than a jury. All the court can do is to tell you you ought to compensate him fully, if at all. You ought to pay him, so far as money goes, for all that he has lost in money, or that he will loose in money; also for pain and suffering, past, present and future.

Now, the evidence in this case shows that Wagner was a good, strong, healthy fellow, an industrious man, working along there. Now, we find him at the end of two years and five months, we find him a cripple; we find him necessarily walking along with a cane;
we find little or no chance of his being able to go to work at
809 all. Now, maybe he will, we all hope he will, and perhaps he will be able to attempt to do something. I haven't any doubt that he will, but I don't know. I do not know, but I say to you now, gentlemen, that whatever his earning capacity has been depreciated, it has been depreciated a very considerable extent. He cannot follow his usual vocation; the avenue of promotion there is practically shut off from him. "The only work that has been suggested is at a crossing—that this man is practically sentenced for the rest of his life to stand at that crossing, with a flag in his hand, almost like an automatic bell——

Mr. EVERETT: I take an exception to the remark that this man is sentenced, from there on, it being an inflammatory remark, calculated to prejudice the minds of the jury, and not borne out by the evidence.

Mr. McSHANE: It has been suggested——

Mr. EVERETT: Just a minute, Mr. McShane.

Mr. McSHANE: That seems to trouble you very bad.

Mr. EVERETT: I want the court to rule on it, so I can have it reviewed.

Mr. McSHANE: Yes, you want everything reviewed.

Mr. EVERETT: Yes, I want you to conduct yourself in the way that you should.

Mr. McSHANE: I withdraw the remark, if there is any question about it. There is nothing to it.

Mr. EVERETT: I take an exception to the remark and to the withdrawing of it.

Mr. McSHANE: It has been, only been suggested that he could stand at a crossing, and that, possibly, if it don't take too long, or he don't have to stand on his feet too much, he can do light work.

810 I said to you, this morning, that this man's earning capacity, under the evidence in this case, has been decreased one-half, and I think it has. I think there is evidence that abundantly warrants that. Suppose it has not, suppose it has been decreased by one-third.

If it has been decreased only one-third, his earning capacity, with the loss, up to the present time, the total runs up in the neighborhood of $20,000, and if he is entitled to anything, he is entitled to full compensation. I say if he is entitled to anything, he is entitled to full compensation.

Now, gentlemen of the jury, I submit to you that no juror will do his duty as a juror unless he can say on his honor and on his oath that the amount that he writes his name under, is, in his judgment, full compensation for all that the man has suffered and all that he will suffer in the future. I repeat that no juror will be doing his duty, unless he can say on his honor and on his oath that the amount he writes his name under is in his judgment full compensation for all that the man has suffered in the past, and all that he will suffer in the future.

I thank you.

The COURT: You agree on a sealed verdict?

Mr. EVERETT: Yes.

Mr. McSHANE: Yes.

The COURT: Gentlemen of the jury, these instructions are given to you, as the law in this case. However, the first paper in these instructions and attached to these instructions, which, however, is not a part of the instructions in any way, but is merely attached

811 to them for convenience, is a question that you are to answer, and prepare a separate paper, and write this out on it, and then put your answer yes or no as it will be, as is suggested at the bottom of the question.

Mr. McSHANE: If the court please, if you will excuse the interruption, our practice is that they just sign that.

The COURT: Your practice here is that they just sign that?

Mr. McSHANE: Yes.

The COURT: My practice is all different, altogether different to that, in that respect. They just sign that?

Mr. McSHANE: Yes.

The COURT: We just use that as a finding, and sign a separate sheet of paper.

Mr. McSHANE: We just sign that here, just have the jurors sign that.

The COURT: My practice is different, in my court we do differently, but I will do as you say; I want to conform to the practice here.

Mr. McSHANE: Yes.

The COURT (addressing the jury): Now, here is a special question which I will read to you, which you are to answer, as I said, and then you are to sign it, you are to write your answer below here.

The question is as follows:

"Q. Do you find from the evidence that on December 15th, 1908, the Chicago, Burlington & Quincy Railroad Company was engaged in interstate commerce between two or more states, and that the plaintiff was injured while employed by it in such commerce?"

812 Answer yes or no."

You will write your answer below here, and return it—attached to your verdict, and return it.

To which action of the court, in giving the above special interrogatory, the defendant, by its counsel, then and there duly excepted.

(The court thereupon proceeded to instruct the jury as to the law involved in said case.)

(After the court had instructed the jury, and before the jury had retired, the following proceedings were had:)

Mr. McSHANE: May they take the declaration and the additional counts?

The COURT: Yes, give them the declaration and the additional counts.

Mr. EVERETT: I object to the declaration and the additional counts going to the jury.

The COURT: Do you object to the declaration going to the jury?

Mr. EVERETT: Yes.

The COURT: What is the ground of your objection?

Mr. EVERETT: That it is not proper for it to go to the jury, as it is no evidence in the case.

Mr. McSHANE: What is that?

Mr. EVERETT: It is not in evidence in this case, it is not an exhibit.

Mr. McSHANE: It is perfectly proper, I think.

The COURT: Yes, the objection will be overruled.

Mr. EVERETT: Exception. Let the record show that the additional count filed May 10th, 1911, and the declaration filed August

813 20th, 1909, both go to the jury over my objection.

To which ruling of the court, the defendant, by its counsel, then and there duly excepted.

Thereupon plaintiff requested and the court gave to the jury on behalf of the plaintiff the following instructions and marked said instructions and each of them "given".

(1) The court instructs the jury that in the event that plaintiff recovers a judgment in this case, and such judgment is paid, he cannot recover a judgment against any other corporation, or person, in any other suit, for or on account of the loss or injuries claimed in the declaration in this suit.

(Given.)

(2) The court instructs the jury that the charge in the declaration in the other suit, (the files of which were introduced in evidence in this suit) to the effect that the Chic[illegible]o and Western Indiana Railroad Company, and other companies there named, owned possessed and operated the track in question, should not be taken or considered by the jury as any evidence showing, or tending to show whether the defendant in this case did or did not own, possess or operate such track.

(Given.)

(3) The court instructs the jury that neither by these instructions, nor by any words uttered or remarks made by the court during this trial, does or did the court intimate or mean to give, or wish to be understood as giving, an opinion as to what the proof is or what it is not, or what the facts are in this case or what are not the facts therein. It is for the jury to find and determine the facts, and this they must do from the evidence, under the law, and, having
814 done so, then apply to them the law as stated in these instructions. The instructions given to the jury are and constitute one connected body and series and should be so regarded and treated by the jury; that is to say, they should apply them to the facts as a whole, and not detached or separated, any one instruction from any or either of the others.

(Given.)

(4) The court instructs the jury that when it is said in these instructions that the plaintiff was required to exercise ordinary care for his own safety, it is meant that he was required to exercise that degree of care which an ordinarily prudent person, situated as he was both before and at the time of the alleged injury, would have exercised for his own safety.

(Given.)

(5) The jury are instructed that the plaintiff is not bound to prove his case beyond a reasonable doubt, but is merely bound to prove it by a preponderance of the evidence.

(Given.)

(6) The preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of evidence is, the jury should also take into consideration, so far as shown by the evidence, the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying, their interest or lack of interest,
if any, in the result of the suit: the probability or improbabil-
815 ity of the truth of their several statements, in view of all the evidence, facts and circumstances proved on the trial; and from all these circumstances, and a full consideration of all the evi-

dence, determine upon which side is the greater weight or preponderance of the evidence.

(Given.)

(7) The court instructs the jury that if you believe from the evidence that any witness has wilfully, knowingly and corruptly sworn falsely on this trial to any matter or thing material to the issues in the case, then the jury are at liberty to disregard his entire testimony except in so far, if at all, as it may have been corroborated by other credible evidence, or by facts and circumstances proved on the trial.

(Given.)

(8) The court instructs the jury, that if you believe from the evidence that the pole in question was moved further away from the track in question, after the accident, than it was at the time of the accident, the fact of such removal of the pole (if it be a fact) should not be regarded or treated by the jury as an implied admission upon the part of anyone, that the pole was too close to the track before such removal.

(Given.)

(9) If, under the evidence and instructions of the court, the jury find defendant guilty, and that plaintiff is entitled to damages, then, in the assessment of such damages, you should not credit the defendant with any sum which the Chicago, Burlington and Quincy Railroad Relief Department paid to the plaintiff, or paid to any doctor, or other person, for or on account of the plaintiff.

(Given.)

816 (10) If, under the evidence and instructions of the court, the jury find the defendant guilty, and that the plaintiff has sustained bodily injuries and damages as charged in the declaration, then in estimating such damages, it will be proper for the jury to consider the nature, extent and duration of such bodily injuries, in so far, if at all, as has been shown by the evidence; and their effect, if any, upon the plaintiff's ability to pursue his trade or calling, and to attend to his affairs generally, in so far, if at all, as has been shown by the evidence; and the loss in earnings, if any, which plaintiff has sustained, or will sustain, as a direct result and in consequence of such injuries, in so far, if at all, as has been shown by the evidence; and the bodily pain and suffering, if any, he sustained, or will sustain, as a direct result and in consequence of such injuries, in so far, if at all, as has been shown by the evidence; and any and all damages, in so far, if at all, as they are alleged in the declaration and shown by the evidence to be the necessary and direct result of the injuries complained of.

(Given.)

Which said instructions and each of them were marked "Given" by the court and were given by the court to the jury; to which action of the court in marking said instructions "Given" and in giving said instructions and each of them to the jury, the defendant by its counsel then and there duly excepted.

817 Thereupon the defendant by its counsel presented to the Court to be given to the jury the following instructions in

writing which said instructions and each of them the Court marked given and gave to the jury.

(11) You are instructed that if you find from the evidence that the plaintiff was injured because of his own contributory negligence, then he can not *receiver* in this case and you must find the defendant not guilty.

(Given.)

(12) You are instructed that as a matter of law, it was as much the duty of the plaintiff in this case to exercise reasonable and ordinary care for his own safety in protecting himself from injury, as it was the duty of the defendant to exercise ordinary and reasonable — in its efforts to avoid injuring the plaintiff. If you find from the evidence in this case, that the plaintiff was injured because of his failure to exercise ordinary and reasonable care for his own safety, or of you find he failed to use ordinary and reasonable care in extricating himself from a dangerous position which he found himself in immediately prior to the happening of the accident, or if you find that he failed to make any effort to protect himself from injury after finding himself in a dangerous position, then in either such case you are instructed he cannot recover and you must find the defendant not guilty.

(Given.)

818 (13) You are instructed that if you find the plaintiff placed himself in a perilous position without any necessity for so doing, and that in so doing he was guilty of contributory negligence, and that by reason of such conduct he was injured, then he cannot recover and under such state of proof you must find the defendant not guilty.

(Given.)

(14) You are further instructed that if you find from the evidence in this case that the Chicago and Alton Railroad Company was not possessed of or in control of the track where the accident occurred, then you must find the defendant not guilty.

(Given.)

(15) You are further instructed that if you find the plaintiff in this case was not permanently injured, then you cannot allow any damages for permanent injuries.

(Given.)

(16) You are instructed that if you believe from the evidence that the injury to the plaintiff was caused by a mere accident to himself, or was caused by some cause for which the defendant was not to blame, or was brought about by some reason or cause different from the cause of negligence charged against the defendant in the plaintiff's declaration, or some count thereof, then in such case, you are instructed that in either event the plaintiff cannot recover in this case and you must find the defendant not guilty.

(Given.)

819 (17) You are instructed that as a matter of law it is your duty under the law to disregard all feeling of sympathy, if any you have, in determining whether or not the defendant is liable in this case. You should find your verdict under the law as

laid down by the Court and the evidence admitted in the case. In finding your verdict you should not take into consideration the financial standing of either of the parties to this suit, nor should you let any feeling of sympathy for either of the parties in this case influence your verdict to the slightest extent.

(Given.)

(18) You are instructed that it — the law that the plaintiff cannot recover in this case, unless he proves by the preponderence of the evidence that the defendant was guilty of the negligence which was the proximate cause of the injury. If on this subject you find the evidence preponderates in favor of the defendant or if you find the evidence is so evenly balanced that you are unable to say upon which side of the case the preponderance of the evidence is, then in either such case it is your duty and you must find the defendant not guilty.

(Given.)

820 (19) You are instructed that it was the duty of the plaintiff in this case immediately prior to and at the time of the happening of the injury to have been exercising ordinary and reasonable care for his own safety. In determining whether or not the plaintiff did at such time exercise ordinary and reasonable care for his own safety, you may take into consideration the conduct of the plaintiff immediately prior to and at the time of the happening of the accident. The law imposed upon him the duty of using that degree of care for his own safety that an ordinar-y prudent person would have exercised under like circumstances for his own safety. If you find from the evidence that the plaintiff immediately prior to and at the happening was not exercising ordinary and *responsible* care for his own safety as explained in this instruction and that by reason thereof he was injured then even though you may find that the defendant was negligent yet if you further find that the injury of the plaintiff was cas*u*ed by his own failure to use the degree of care herein stated then he cannot recover and you must find the defendant not guilty.

(Given.)

(20) You are instructed that the mere fact that the plaintiff was injured while using the track in question does not entitle him to a verdict against the defendant, Chicago & Alton Railroad Company, nor in the happening of the injury to him any evidence whatever that the defendant is liable to the plaintiff for his injuries, nor that he is entitled to a verdict. Before the plaintiff can recover the law requires of him that he prove by the preponderance of the evidence, that the defendant was guilty of negligence which was the proximate cause of his injuries, and if the plaintiff fails to do this, then your verdict must be not guilty.

(Given.)

821 (21) You are further instructed that the law imposed upon the plaintiff the duty of observing the open and obvious conditions that exist about him immediately prior to and at the time of the accident. If you find from the evidence that the semephore and its location was open and obvious to a person of

ordinary intelligence and to a person who was exercising ordinary and reasonable care for his own safety, then not withstanding the fact that the plaintiff came in contact with the said semaphore and was injured, yet if you further find the condition and location of the semaphore was an open and obvious condition and one that could have been seen by an ordinarily prudent person exercising ordinary care for his own safety then the law is, that the plaintiff must have notice of such open and obvious condition, and if you further find that the plaintiff was injured because of his failure to observe such open and obvious condition of the semaphore as aforesaid, then the plaintiff cannot recover and you must find the defendant not guilty.

(Given.)

822 (22) You are further instructed that it was not the duty of the defendant in this case to exercise the highest *of* degree of care in the construction and maintanence of its track and the semaphore in question. The only duty the defendant owed to the plaintiff, was to exercise ordinary and reasonable care in the construction and maintenance of its track and semaphore. Ordinary care in this respect means that the degree of care that an ordinar-y prudent person would have exercised in the construction and maintanence of its track and semaphore under similar circumstances. If you find the defendant exercised that degree of care then even though you may find the plaintiff was injured because of the close proximity of the semaphore to the track yet, never the less if you find the defendant exercised the degree of care stated herein, then the plaintiff cannot recover and you must find the defendant not guilty.

(Given.)

(23) You are further instructed that the defendant was not an insurer of the safety of the employees of railroads who were using the track in question. The only duty that the defendant owed to the employees of other railroad companies which were using the said track, was to exercise ordinary and reasonable care to see that the track was reasonably safe for the operation of trains thereon. If the defendant in this case exercised that degree of care, then, even though you may find that the plaintiff was injured because of the close proximity of the track and the semaphore still the plaintiff cannot recover and you must find the defendant not guilty.

(Given.)

823 (24) The Court instructs the jury that because the Court has instructed you on the measure of damages, you must not take such fact as any intimation whatever that the Court intimates to you that you should or you should not allow any damages whatever in this case. That is a question solely for you to determine after considering all the evidence and applying the instructions of the Court if after you have considered all the evidence and applied the instructions of the Court you find that the defendant is not guilty of the negligence charged against it, then you will have no occasion whatever to consider the question of damages, but in any event, the

Court did not and does not now intend to intimate to you that the plaintiff should or should not be allowed damages.

(Given.)

(25) You are further instructed that if you find from the evidence that the plaintiff saw the semaphore in question before the car upon which he was riding reached it or by the exercise of ordinary care for his own safety he could have seen the said semephore as aforesaid, and if you further find that the plaintiff unnecessarily remained upon the car beleiving that he could pass between the said semaphore and the car, then of you further find that in so doing he did not exercise ordinary and reasonable care for his own safety, yet not with standing the fact that he was struck by said semaphore and injured, he cannot recover under such state of fact and you must find the defendant not guilty.

(Given.)

824 (26) You are instructed as a matter of law, that before you can find the defendant, Chicago and Alton Railroad Company guilty of negligence in this case, you must find that the plaintiff has proved by the greater weight of the evidence that that company did something or omitted to do something that an ordinarily prudent person would not have omitted or would have done under like circumstances for the safety of those who were using the track in question. If you find from the evidence that the defendant did not do anything and did not omit doing something that an ordinar-y prudent person would have done or omitted to do in the exercise of ordinary and reasonable care for the safety of those using the track, then, not withstanding you may find the semaphore was placed to- close to the track and that the plaintiff was injured by reason thereof yet, under such state of proof the plaintiff cannot recover and you must find the defendant not guilty.

(Given.)

(27) You are further instructed that if you find from the evidence in this case that an ordinarily prudent person in the exercise of ordinary care for his own safety would have jumped off the car in question had he been placed in a situation similar to the one the plaintiff found himself in immediately prior to and at the time of the accident, and if you further find that he had the opportunity to so jump off the car and that he failed to do so, yet if you further find that in not doing so the plaintiff failed to exercise ordinary and reasonable care for his own safety and by reason thereof was injured, then he cannot recover and you must find the defendant not guilty.

(Given.)

825 To the giving of the foregoing instructions, and each one thereof to the jury at the request of the defendant, plaintiff by his counsel then and there duly excepted.

Whereupon the defendant by its counsel presented to the Court and asked it to give to the jury the following instructions in writing:

(28) You are further instructed that in determining whether or not the plaintiff was exercising ordinary and reasonable care for

his own safety immediately prior to and at the time of the accident in question, you may take into consideration the conduct of the plaintiff. You may also take into consideration his experience as a switchman his knowledge of the conditions that existed about him at the place where the semaphore was located, his opportunity of observing the distance between the semaphore and the car *and* it passed the said semaphore, his opportunity of getting on the car in a different position, his opportunity for knowing and appreciating the danger he was about to encounter and his oppurtunity for avoiding the same, if any, the speed at which the train approached the semaphore, of you find that is material in determining the case he was exercising, and all other facts and circumstances shown by the evidence which have a bearing upon his conduct immediately prior to and at the time of the accident and if after you have considered all the conditions shown by the evidence you find that the plaintiff failed to exercise that degree of care that an ordinarily prudent person would have exercised under like circumstances for his own safety and that by reason thereof the plaintiff was injured,

826 then under such state of fact he cannot recover and you must find the defendant not guilty.

(Refused.)

(29) You are further instructed that if you find from the evidence in this case that the plaintiff accepted a sum of money as damages for injuries that he sustained at the time and place charged in the declaration from the Chicago, Burlington and Quincy Railroad Company, and that in consideration of the payment of said money for such damages the plaintiff accepted said money for full payment and release of all claims that he had or might have against the said Chicago, Burlington and Quincy Railroad Company for damages for said injuries, then you are instructed as a matter of law, receiving said payment in full satisfaction and release of his claims that he had or might have against said Chicago, Burlington and Quincy Railroad Company is a bar to his action against the defendant the Chicago and Alton Railroad Company and if you find that he accepted a payment of money from the Chicago, Burlington and Quincy Railroad Company, as aforesaid, and released them as aforesaid, then you are instructed the acceptance of such payment is a bar to this action and under such state of proof you must find the defendant not guilty.

(Refused.)

827 (30) You are further instructed as a matter of law, that where a person is injured and more than one person or corporation is jointly severally liable to such person for damages for his injuries and one of said persons or corporations pays to the injured person a sum of money in full satisfaction and release of his damages *of* said injuries, then you are instructed that such injured person cannot recover damages for the same injury, in other words where the plaintiff in the case has received payment in full from one of the joint tort feasors and released the one paying the money from all liabilities for such injury in full settlement for his dam-

ages for such injury, he *hus* barred from recovering damages against any other person or Company liable for the same injury.

(Refused.)

(31) The Court instructs the jury that when an injury is caused by the acts of two or more persons, such persons causing such injury are in law called joint tort feasors. The Court also instructs the jury that if the person receiving such injuries accepts in payment of his injuries anything of value from one of said so called tort feasors such acceptance on his part is a release of all liabilities on the part of the other of the so called tort feasors.

(Refused.)

828 (32) In determining whether or not the plaintiff exercised ordinary and reasonable care for his own safety, you may take into consideration the fact that the plaintiff could see the semaphore had he looked, and that he might have appreciated the danger of riding upon the car in the manner in which he rode upon the car immediately prior to and at the time of his injury. If you find his conduct in this respect was a failure to exercise ordinary and reasonable care for his own safety, and if you further find that in so doing, he was guilty of contributory negligence, then under such state of fact the plaintiff cannot recover and you must find the defendant not guilty.

(Refused.)

(33) The court instructs the jury that the movement the train in question was making immediately prior to and at the time of the accident to the plaintiff, was not an interstate movement and the plaintiff was not at that time, in law, engaged in the management of a train that was engaged in interstate commerce.

(Refused.)

(34) The court instructs the jury that the plaintiff was not immediately prior to and at the time of the accident to the plaintiff engaged in interstate commerce.

(Refused.)

(35) The court instructs the jury that the plaintiff cannot recover under the second additional count of his declaration.

(Refused.)

(36) The court instructs the jury that the plaintiff cannot recover under the first count of his declaration.

(Refused.)

829 (37) The court instructs the jury that the plaintiff cannot recover under the first additional count of his declaration.

(Refused.)

But the court marked the said instructions and each of them "Refused" and refused to give the said instructions or any of them to the jury.

To which action of the court in marking said instructions and each of them "refused" and in refusing to give the said instructions and each of them to the jury the defendant by its counsel then and there duly excepted.

Which were all of the instructions offered or requested by either

party to be given by the court to the jury, and all the instructions given by the court to the jury and all the instructions refused to be given by the court to the jury on the trial of said cause.

Whereupon the jury retired to consider of their verdict and returned into court a verdict finding the defendant guilty and assessing the plaintiff's damages at the sum of Fifteen thousand dollars ($15,000.00). The jury also returned into court the special interrogatory given to them by the court on behalf of the plaintiff answered, "yes," and signed by all of the eleven jurors.

Whereupon the defendant by its counsel moved the court to set aside the verdict finding the defendant guilty and asked the court to grant said defendant a new trial in said cause; which motion for a new trial was in words and figures as follows to-wit:

830 STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 273,695. Term No. 6501.

JOSEPH M. WAGNER
vs.
CHICAGO AND ALTON RAILROAD COMPANY.

Now comes the defendant, Chicago and Alton Railroad Company, by Winston, Payne, Strawn & Shaw, its attorneys, and moves the court to set aside the verdict and grant the defendant a new trial for the following reasons:

1. The verdict is contrary to the evidence.
2. The verdict is contrary to the preponderance of the evidence.
3. The verdict is contrary to the law.
4. The verdict is contrary to the law and the evidence.
5. The court erred in admitting improper evidence offered by the plaintiff over the objection of the defendant.
6. The court erred in not excluding upon the motion of the defendant, improper evidence admitted on the part of the plaintiff.
7. The court erred in refusing to admit proper evidence offered by the defendant.
8. The court erred in refusing to receive in evidence the offers of the defendant to produce certain evidence.
9. The court erred at the conclusion of the evidence offered by the plaintiff, in denying the defendant's motion to exclude the evidence and instruct the jury to find the defendant not guilty.

831 10. The court erred at the conclusion of all the evidence, in denying the motion of the defendant to exclude the evidence from the consideration of the jury and in refusing to instruct the jury to find the defendant not guilty, and in marking the instruction offered at this time by the defendant "refused."

11. The court erred in refusing at the conclusion of all the evidence in refusing to peremptorily instruct the jury to find the de-

fendant not guilty, because the evidence showed that the plaintiff had satisfied and released in full to the Chicago, Burlington & Quincy Railroad Company for damages he sustained on December 15, 1908, which were the same damages he was attempting to recover in this cause.

12. The court erred in refusing to peremptorily instruct the jury at the conclusion of all the evidence, because at that time the evidence was uncontradicted that the plaintiff had released one of two joint tort-feasors, and, as a matter of law, the release of one tort feasor, releases all joint tort feasors.

13. The verdict is excessive.

14. The verdict is the result of passion and prejudice.

15. The counsel for the plaintiff, during the trial of the case while evidence was being offered made improper remarks in the hearing of the jury, which tended to inflame the minds of the jury and prejudice them against the defendant.

16. The counsel for the plaintiff in his opening argument to the jury and in his closing argument to the jury made improper remarks which remarks tended to inflame the minds of the jury and prejudice them against the defendant.

17. The court erred in ruling upon the improper remarks of counsel during the trial of the case, and not ruling in a
832 manner that would obviate the inflammatory effect of the remarks upon the jury.

18. The court erred in giving improper instructions to the jury requested and presented by the plaintiff.

19. The court erred in refusing to give to the jury proper instructions requested and presented by the defendant.

20. The court erred in refusing to allow defendant's motion to exclude certain evidence because of variance with the several counts of the declaration.

21. The court erred in giving to the jury a certain special interrogatory presented and requested by the plaintiff.

22. The court erred in refusing to exclude the evidence from the jury at the close of all the evidence and in refusing to peremptorily instruct the jury to find the defendant not guilty, because at that time the undisputed evidence showed that the plaintiff failed to exercise ordinary and reasonable care and that he was injured by reason of his own contributory negligence.

23. The court erred in denying the defendant's motion to strike out certain testimony given on behalf of the plaintiff, and in refusing to strike out such testimony.

24. The court erred in striking out and excluding upon the motion of the plaintiff, proper evidence introduced by the defendant, the striking out and exclusion of which testimony, was prejudicial to the rights and interests of the defendant.

25. The court erred in permitting the counsel for the plaintiff, over the objection of the defendant, in his closing argument, to argue to the jury the questions of injuries and damages, because the counsel for the defendant did not, in his argument answer or

advance any new argument on these questions in answer to counsel's for plaintiff opening argument.

833 26. The court erred in refusing to sustain defendant's objection to the argument of attorney for the plaintiff in misstating the law to the jury in reference to the right of a plaintiff to recover damages in more than one suit for the same injury.

27. The court erred in refusing to hold plaintiff's counsel to his agreement and stipulation in reference to the Interstate Commerce Law affecting the case, and in permitting the plaintiff in rebuttal to offer and make proof that the plaintiff was engaged in the operation of a train that was engaged in Interstate Commerce.

WINSTON, PAYNE, STRAWN & SHAW,
Attorneys for Defendant.

834 But the court overruled and denied defendant's said motion for a new trial and refused to grant a new trial in said cause, to which action of the court in so overruling and denying defendant's motion for a new trial and in refusing to grant a new trial in said cause, defendant by its counsel then and there duly excepted.

Whereupon the defendant moved the court in arrest of judgment, but the court after hearing arguments upon said motion, overruled and denied said motion in arrest of judgment, to which action of the court in so overruling and denying said motion in arrest of judgment, the defendant by its counsel duly excepted.

Whereupon the court entered judgment in favor of the plaintiff and against the defendant in the sum of Fifteen thousand dollars ($15,000.00) and costs of suit, to which action and ruling of the court in entering judgment against the defendant and in favor of the plaintiff in the said sum of Fifteen thousand dollars ($15,000.00) and costs of suit, said defendant by its counsel then and there duly excepted.

Whereupon the defendant prayed an appeal from said judgment to the Appellate Court in and for the first District of the State of Illinois, which said appeal was allowed upon the filing by the defendant of its appeal bond in the sum of Seventeen thousand dollars ($17,000.00) within thirty days from the 3rd day of June 1911, and upon the filing of its bill of exceptions in said cause within ninety days from the 3rd day of June 1911.

For as much as the matters and things above set forth do now fully appear of record, the defendant The Chicago & Alton Railroad Company tenders this, its bill of exceptions and prays that

835 the same may be signed and sealed by the Judge who tried this cause pursuant to statute in such case made and provided, which is done accordingly this 2nd day of August A. D. 1911.

JOHN McNUTT,
Sitting as a Judge of the Superior Court of Cook County, at the Request of the Judges of said Superior Court.

O. K.
JAMES C. McSHANE,
Att'y for Plaintiff.

836 Filed Aug. 3, 1911. Charles W. Vail, per 3.

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

General No. 273,695, Term No. 6501.

JOSEPH M. WAGNER
v.
CHICAGO & ALTON R. R. COMPANY.

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys, that the original bill of exceptions in this cause may be by the Clerk of said court inserted in the transcript of the record in lieu of the copy of the original bill of exceptions in case an appeal is perfected, or a writ of error sued out in the foregoing cause, to the Appellate Court in and for the First District of the State of Illinois, and the Supreme Court of Illinois.

JAMES C. McSHANE,
Attorneys for Plaintiff.
WINSTON, PAYNE, STRAWN & SHAW,
Attorneys for Defendant.

837 And afterwards to-wit, on the 7th day of August A. D. 1911 a certain Notice & Præcipe was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

General No. 273,695, Term No. 6501.

JOSEPH M. WAGNER
v.
THE CHICAGO AND ALTON RAILROAD COMPANY, a Corporation.

Notice.

To James C. McShane, 822 New York Life Building, Attorney for Plaintiff:

Please take notice that on Monday, August 7th, 1911, we shall file a præcipe in the office of the Clerk of the Superior Court in the County aforesaid, directing him to certify the record in the above-entitled cause to the Appellate Court in and for the First District of the State of Illinois, a copy of which said præcipe is hereto attached.

WINSTON, PAYNE, STRAWN & SHAW,
Attorneys for the Chicago and Alton Railroad Company.

Received a copy of the foregoing notice and copy of præcipe thereto attached this 1st day of August, A. D. 1911.

JAMES C. McSHANE,
Attorney for Plaintiff.

838 STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

General No. 273,695, Term No. 6501.

JOSEPH M. WAGNER
v.
THE CHICAGO AND ALTON RAILROAD COMPANY, a Corporation.

Præcipe for Record.

To Charles W. Vail, Clerk of the Superior Court of Cook County:

Please certify the following parts of the record in the above-entitled cause to the Appellate Court in and for the First District of the State of Illinois: The præcipe, summons, declaration, all pleas thereto, additional count, all pleas to additional count, demurrer to plea of Statute of Limitations to additional county, verdict, appeal bond, bill of exceptions, all motions and all orders.

WINSTON, PAYNE, STRAWN & SHAW,
Attorneys for the Chicago and Alton Railroad Company.

839 (On back of cover:) General No. 273,695. Term No. 6,501. In the Superior Court of Cook County. Joseph M. Wagner, v. The Chicago and Alton Railroad Company, a corporation. Notice, and Præcipe for Record. Filed Aug. 7 2-41 P. M. 1911. Chas. W. Vail, Clerk, per 3. Winston, Payne, Strawn & Shaw, Attorneys at Law, First National Bank Building, Chicago.

840 And afterwards to-wit, on the 7th day of August A. D. 1911 a certain Præcipe for Record was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

General No. 273,695, Term No. 6501.

JOSEPH M. WAGNER
v.
THE CHICAGO AND ALTON RAILROAD COMPANY, a Corporation, et al.

Præcipe for Record.

To Charles W. Vail, Clerk of the Superior Court of Cook County:

Please certify the following parts of the record in the above-entitled cause to the Appellate Court in and for the First District of the State of Illinois: The præcipe, summons, declaration, all pleas thereto, additional count, all pleas to additional count, demurrer to plea of Statute of Limitations to additional count, verdict, appeal bond, bill of exceptions, all motions and all orders.

WINSTON, PAYNE, STRAWN & SHAW,
Attorneys for the Chicago and Alton Railroad Company.

841 (On back of cover:) General No. 273,695, Term No. 6501. In the Superior Court of Cook County. Joseph M. Wagner v. The Chicago and Alton Railroad Company. Præcipe for record. Winston, Payne, Strawn & Shaw, Attorneys at Law, First National Bank Building, Chicago.

842 STATE OF ILLINOIS,
County of Cook, ss:

I, Charles W. Vail, Clerk of the Superior Court of Cook County in and for the State of Illinois, and the keeper of the records, files and seals thereof, do hereby certify the above and foregoing to be a true, perfect and complete Transcript of the Record as per præcipe on file herein, except the Bill of Exceptions the original of which is by stipulation of the parties incorporated herein and made a part hereof, in a certain cause lately pending in said Court on the Law side thereof, wherein Joseph M. Wagner was plaintiff and Chicago and Alton Railroad Company, defendant.

In witness whereof, I have hereunto set my hand, and affixed the seal of said Court, at Chicago, this 12th day of August A. D. 1911.

[SEAL.] CHARLES W. VAIL, *Clerk.*

Transcript of record (not including bill of ex.) contains
9380 words @ 10¢ $9.38
.50

$9.88

A. R. PORTER, *Clerk.*

843 In the Appellate Court of Illinois, First District, October Term, A. D. 1911.

JOSEPH M. WAGNER, Appellee,
vs.
CHICAGO & ALTON RAILROAD COMPANY, a Corporation, Appellant.

Appeal from Superior Court, Cook County, Hon. John McNutt, Judge, Presiding.

Assignment of Errors.

Now comes appellant, Chicago & Alton Railroad Company, by Winston, Payne, Strawn & Shaw, its attorneys, and says, that in the record and proceedings in the Superior Court of Cook County, Illinois, wherein a judgment was entered against said appellant, and from which judgment of said Superior Court of Cook County, Illinois, said appellant has perfected its appeal to this Court, there were manifest errors in this, to-wit:

1. The verdict and judgment in the court below are contrary to the evidence.
2. The verdict and judgment in the court below are contrary to the preponderance of the evidence.
3. The verdict and judgment in the court below are contrary to the law.
4. The verdict and judgment in the court below are contrary to the law and the evidence.
5. The court erred in admitting improper evidence offered by appellee over the objection of appellant.
6. The court erred in not excluding, upon motion of appellant, improper evidence admitted on the part of appellee.

844 7. The court erred in refusing to admit proper evidence offered by appellant.

8. The court erred in refusing to receive in evidence offers of appellant to produce certain evidence.
9. The court erred at the conclusion of the evidence offered by appellee, in denying the motion of appellant to exclude the evidence from the consideration of the jury and to instruct the jury to find appellant not guilty.
10. The court erred at the conclusion of all the evidence, in denying the motion of appellant to exclude the evidence from the consideration of the jury and in refusing to instruct the jury to find appellant not guilty, and in marking the instruction offered at that time by appellant "refused."
11. The court erred in refusing at the close of all the evidence to peremptorily *to* instruct the jury to find appellant not guilty, because the evidence showed that appellee had satisfied and released in full the Chicago, Burlington & Quincy Railroad Company for damages he sustained on December 15, 1908, which were the same damages he was attempting to recover in this case.

12. The court erred in refusing to peremptorily instruct the jury at the conclusion of all the evidence, because at that time the evidence was uncontradicted that appellee had released one of two joint tort-feasors, and, as a matter of law, the release of one tort feasor, releases all joint tort feasors.

13. The verdict is excessive.

14. The verdict is the result of passion and prejudice.

15. Counsel for appellee during the trial of the case, while evidence was being offered, made improper remarks in the
845 hearing of the jury, which tended to inflame their minds and prejudice them against appellant.

16. Counsel for appellee in his opening and closing arguments to the jury made improper remarks, which remarks tended to inflame the minds of the jury and prejudiced them against appellant.

17. The court erred in ruling upon the improper remarks of counsel for appellee made during the trial of the case, and erred in not ruling in a manner that would obviate the inflammatory effects of the remarks upon the jury.

18. The court erred in giving improper instructions to the jury, requested and presented by appellee.

19. The court erred in refusing to give to the jury proper instructions requested and presented by appellant.

20. The court erred in refusing to allow appellant's motion to exclude certain evidence because of variance with the several counts of the declaration.

21. The court erred in giving to the jury a certain special interrogatory presented and requested by appellee.

22. The court erred in refusing to exclude the evidence from the jury at the close of all the evidence, and in refusing to peremptorily instruct the jury to find appellant not guilty because at that time the undisputed evidence showed that appellee failed to exercise ordinary and reasonable care and that he was injured by reason of his own contributory negligence.

23. The court erred in denying appellant's motion to strike out certain testimony given on behalf of appellee, and in refusing to strike out such testimony.

24. The court erred in striking out and excluding upon motion of appellee proper evidence introduced by appellant, the
846 striking out and exclusion of which testimony, was prejudicial to the rights and interests of appellant.

25. The court erred in permitting counsel for appellee, over the objection of appellant, in his closing argument to argue to the jury the question of injuries and damages, because counsel for appellant did not in his argument, answer or advance any new argument on such questions, in answer to the opening argument of counsel for appellee.

26. The court erred in refusing to sustain appellant's objection to the argument of appellee's counsel in misstating the law to the jury in reference to the right of appellee to recover damages in more than one suit for the same injury.

27. The court erred in refusing to hold appellee's counsel to his

agreement and stipulation in reference to the Interstate Commerce Law affecting the case, and in permitting appellee in rebuttal to offer and make proof that appellee was engaged in the operation of a train engaged in Interstate Commerce.

28. The court erred in refusing to set aside the verdict and grant a new trial.

29. The court erred in refusing to allow appellant's motion in arrest of judgment.

For which and various other errors appearing in the record, appellant prays that judgment may be reversed without remanding the cause or reversed and remanded.

CHICAGO & ALTON RAILROAD COMPANY,
By WINSTON, PAYNE, STRAWN & SHAW,
Its Attorneys.

847 *Appellee's Assignment of Cross-errors.*

And now comes appellee in the above entitled cause by James C. McShane, his attorney, and assigns cross-errors upon the record of the proceedings of the Superior Court of Cook County, filed herein, as follows:

1st. The trial court erred in giving to the jury, at the request of appellant, improper and erroneous instructions.

2nd. The trial court erred in refusing to give to the jury proper and competent instructions requested by appellee.

3rd. The trial court erred in excluding and refusing to admit competent and material evidence offered by and in behalf of appellee.

4th. The trial court erred in admitting improper and incompetent evidence offered by appellant and received over the objection of appellee.

5th. The trial court erred in striking out competent and material evidence given by the witnesses and afterwards stricken out by the court over appellee's objection.

Appellee alleges that each and all of the above errors were prejudicial to him; and while he asks this court to affirm the judgment rendered in this cause, he also asks that upon the hearing of this cause, that he be not concluded, estopped or bound by any of said erroneous rulings, but that he be permitted to complain of each and all of said rulings.

JAMES C. McSHANE,
Attorney for Appellee.

Filed Appellate Court, Oct. 6, 1911. Alfred R. Porter, Clerk.

848 Form No. 4.

In the Appellate Court, First District, Illinois.

No. 18032.

JOSEPH M. WAGNER, Appellee,
vs.
CHICAGO & ALTON R. R. Co., Appellant.

Appeal Cook Superior.

Error Cook.

I, Alfred R. Porter, Clerk of the Appellate Court, within and for the First District of Illinois, and keeper of the records, files and seal thereof, do hereby certify that the Transcript of Record hereto attached and marked "A" is the original transcript of record filed in said Appellate Court, on the 4 day of October A. D. 1911, by said Appellant.

In testimony, whereof, I have hereunto set my hand and seal of said Court, at Chicago, Illinois, this 19 day of September A. D. 1913.

[SEAL.]

ALFRED R. PORTER,
Clerk of the Appellate Court,
First District, Illinois.

849 [Endorsed:] 9198. 35. Record from Appellate Court, First District, to Supreme Court. Nisi prius Gen. No. 273,695. Appellate Gen. No. 18032. Supreme Court Gen. No. —. John M. Wagner, vs. Chicago & Alton Railroad Company, a corporation. Filed Sep. 17, 1913. J. McCan Davis, Clerk of Supreme Court.

850 At a term of the Appellate Court Begun and held at Chicago, on Tuesday, the Fourth day of March, in the year of our Lord One Thousand Nine Hundred and thirteen, within and for the First District of the State of Illinois.

Present: Hon. Martin M. Gridley, Presiding Justice.
" " William H. McSurely, Justice, "D."
" " Joseph H. Fitch, Justice.
Michael Zimmer, Sheriff.
Alfred R. Porter, Clerk.

Court met pursuant to law—Court opened by proclamation.

No. 18032.

JOHN M. WAGNER, Appellee,
vs.
CHICAGO & ALTON RAILROAD COMPANY, a Corporation, Appellant.

Appeal from Superior Court of Cook County.

Be it remembered, That on the third day of October, A. D. 1911, it being one of the days of the October Term, A. D. 1911 certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

851 At a term of the Appellate Court Begun and held at Chicago, on Tuesday, the Third day of October, in the year of our Lord One Thousand Nine Hundred and Eleven, within and for the First District of the State of Illinois.

Present: Hon. Edward O. Brown, Presiding Justice.
" " Ben M. Smith, Justice.
" " Frank Baker, Justice.
Michael Zimmer, Sheriff.
Alfred R. Porter, Clerk.

Court opened by proclamation.

And afterwards on the 4th day of October, A. D. 1911, the following proceedings were had and entered of record in said cause, to-wit:

852 October Term, A. D. 1911, Calendar.

In the Matter of the Assignment of Cases to the "B" Branch Appellate Court, First District, Illinois.

On the Court's own motion it is ordered that the following numbered cases on the October Term Calendar, A. D. 1911 of said Court be and the same are hereby assigned to the "B" Branch Appellate Court for hearing and determination, to-wit:
492-18032 et al.

And afterwards, on the 19th day of December, A. D. 1911, it being one of the days of the October Term, A. D. 1911, of said Court, the following proceedings were had and entered of record in said cause, to-wit:

853 TUESDAY, December 19th, A. D. 1911.

Present: Hon. Jesse A. Baldwin, Presiding Justice.
" Thomas C. Clark, " "B."
" Frederick A. Smith, "
Michael Zimmer, Sheriff.
Alfred R. Porter, Clerk.

Court met pursuant to an adjournment.

And thereupon on the same day, to-wit, the 19th day of December, A. D. 1911, the following proceedings were had and entered of record in said cause, to-wit:

854 18032.

JOSEPH M. WAGNER, Appellee,
vs.
CHICAGO & ALTON RAILROAD COMPANY, Appellant.

Appeal Cook Superior.

This day came appellant, by its counsel, and moved the Court to extend the time to and including March 1, A. D. 1912, in which to file its abstracts and briefs in said cause, and appellee have to and including April 1, 1912, in which to file his briefs, and that appellant have thirty (30) days thereafter in which to file its reply briefs in said cause, as per affidavit and stipulation filed herein; and the Court being fully advised in the premises, doth order that said time be and the same is hereby so extended.

And afterwards, on the 26th day of December, A. D. 1911, the following proceedings were had and entered of record in said cause, to-wit:

855 At a term of the Appellate Court Begun and held at Chicago, on Tuesday, the Third day of October, in the year of our Lord One Thousand Nine Hundred and Eleven, within and for the First District of the State of Illinois.

Present: Hon. Edward O. Brown, Presiding Justice.
" " Ben M. Smith, " "A."
" " Frank Baker, "
Michael Zimmer, Sheriff.
Alfred R. Porter, Clerk.

Court met pursuant to law. Court opened by proclamation.

And afterwards, on the 26th day of December, A. D. 1911, it being one of the days of the said October term, A. D. 1911, of said Court, the following proceedings were had and entered of record in said Court, to-wit:

TUESDAY, December 26, A. D. 1911.

Present: Hon. Edward O. Brown, Presiding Justice.
" " Ben M. Smith, " "A."
" " Frank Baker, "
Michael Zimmer, Sheriff.
Alfred R. Porter, Clerk.

Court met pursuant to an adjournment.

In the Matter of the Designation of the Third Branch Appellate Court, First District, Illinois.

It is ordered by the Court that for the purpose of the assignment of cases for hearing and determination, the third Branch Appellate Court, now presided over by Justices Henry V. Freeman, Marcus Kavanagh and Martin M. Gridley, shall be known and designated as the "D" Branch Appellate Court, and the Clerk of this Court is hereby authorized and directed to indicate upon the Clerk's docket of this Court the assignment of each case, when made, in the manner aforesaid.

856 And afterwards on the twenty-eight- day of December, A. D. 1911, the following proceedings were had and entered of record in said Court to-wit:

October Term, A. D. 1911, Calendar.

In the Matter of the Vacation of the Orders Assigning Cases to the "B" Branch Appellate Court, First District, Illinois.

On the Court's own motion it is ordered that the order or orders heretofore entered assigning the following cases of the October Term, A. D. 1911 Calendar of this Court to the "B" Branch Appel-

late Court for hearing and determination, to-wit, numbers 492-18032 et al. be and the same are hereby vacated and set aside. It is further ordered that this order shall not operate to vacate or set aside any order of said "B" Branch Appellate Court heretofore made and entered of record in any of said causes.

And afterwards, on the same day, to-wit, the twenty-eighth day of December, A. D. 1911, the following proceedings were had and entered of record in said Court to-wit:

857 October Term, A. D. 1911, Calendar.

In the Matter of the Assignment of Cases to the "D" Branch Appellate Court, First District, Illinois.

On the Court's own motion it is ordered that the following cases *on* October Term A. D. 1911 Calendar of this Court be and the same are hereby assigned to the "D" Branch Appellate Court for hearing and determination, to-wit, numbers 492-18032 et al.

And afterwards, on the 1st day of February, A. D. 1912, it being one of the days of the October Term, A. D. 1911, of said Court, the following proceeding- were had and entered of record in said cause, to-wit:

858 THURSDAY, February 1st, A. D. 1912.

Present: Hon. Henry V. Freeman, Presiding Justice.
" " Marcus Kavanagh, " "D."
" " Martin M. Gridley, "
Michael Zimmer, Sheriff.
Alfred R. Porter, Clerk.

Court met pursuant to an adjournment.

And thereupon on the same day, to-wit: the first day of February, A. D. 1912, the following proceedings were had and entered of record in said cause, to-wit:

859 No. 18032.

JOSEPH M. WAGNER
vs.
CHICAGO & ALTON R. R. Co.

Error to Cook.

Appeal from Cook Superior.

This cause having this day been reached in the call of the docket, and counsel desiring to argue the same, *and* the Court, not being fully advised in the premises doth order that said cause be taken

under advisement on abstracts and briefs to be filed by appellant by March 1/12, appellee's briefs by April 1/12, 30 days thereafter for reply briefs, and to be argued orally on a date in the future to be fixed by the Court.

And afterwards, on the 23rd day of May, A. D. 1912, it being one of the days of the March Term, 1912, of said Court, the following proceedings were had and entered of record in said cause, to-wit:

860

18032.

JOSEPH M. WAGNER, Appellee,
vs.
THE CHICAGO & ALTON RAILROAD CO., Appellant.

Appeal Cook Superior.

This day came appellee, by his counsel, and moved the Court for leave to file his briefs in said cause instanter, as per affidavit and stipulation filed herein; and the Court being fully advised in the premises, doth order that said motion be and the same is hereby allowed.

And afterwards, on the 30th day of January, A. D. 1913, it being one of the days of the October Term, 1912 of said Court, the following proceedings were had and entered of record in said cause, to-wit:

861

18032.

JOSEPH M. WAGNER, Appellee,
vs.
CHICAGO & ALTON RAILROAD COMPANY (a Corp.), Appellant.

Appeal Cook Superior.

This day came appellant by its counsel, and moved the Court for leave to file its reply briefs in said cause instanter, as per affidavit and stipulation filed herein; and the Court being fully advised in the premises, doth order that said motion be and the same is hereby allowed.

And afterwards, on the 8th day of May, A. D. 1913, it being one of the days of the March Term, 1913, of said Court, the following proceedings were had and entered of record in said cause, to-wit:

862 18032.

JOHN M. WAGNER, Appellee,
vs.
CHICAGO & ALTON RAILROAD COMPANY (a Corporation), Appellant.

Appeal Cook Superior.

On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error in so far as said judgment of the Superior Court of Cook County exceeds the amount of Fourteen Thousand six hundred and twelve dollars and ninety-one cents ($14,612.91).

Therefore it is considered by the Court that upon appellee filing a remittitur within ten days from this date in the sum of Three Hundred and Eighty-seven Dollars and Nine cents ($387.09) from the amount of the judgment of said Superior Court of Cook County heretofore rendered in said cause, that said judgment be affirmed as to the remainder, namely, the sum of Fourteen Thousand Six Hundred and Twelve Dollars and Ninety-one cents ($14,612.91); otherwise that said judgment be reversed and the cause remanded, appellee to pay costs in this Court.

And afterwards, on the same day, to-wit, the 8th day of May, A. D. 1913, the following proceedings were had and entered of record in said cause, to-wit:

863 18032.

JOHN M. WAGNER, Appellee,
vs.
CHICAGO & ALTON RAILROAD COMPANY (a Corporation), Appellant.

Appeal Cook Superior.

On this day came again the said parties, and the appellee having remitted the sum of Three Hundred and Eighty seven dollars and nine cents ($387.09) from the amount of the judgment heretofore entered in the Superior Court of Cook County in said cause, in accordance with the opinion of this Court heretofore filed in said cause;

It is therefore ordered by the Court that the judgment of the Superior Court of Cook County in this behalf rendered be affirmed as to the remainder, namely, the sum of Fourteen Thousand Six Hundred and Twelve Dollars and Ninety-one cents ($14,612.91), and stand in full force and effect as to that amount, notwithstanding the said matters and things herein assigned for error.

And it is further considered by the Court that the said Appellant recover of and from the said Appellee its costs, by it in this behalf expended, to be taxed and that it have execution therefor.

And afterwards, on the 22nd day of May, A. D. 1913, the following proceedings were had and entered of record in said cause, to-wit:

864

18032.

JOHN M. WAGNER, Appellee,
vs.
CHICAGO & ALTON RAILROAD CO. (a Corp.), Appellant.

Appeal from Cook Superior.

Error to ——.

The Court having considered the petition of appellant praying for a rehearing in said cause, and being now fully advised in the premises, doth order that the prayer of said petition be and the same is hereby denied.

And afterwards, on the 29th day of May, A. D. 1913, the following proceedings were had and entered of record in said cause, to-wit:

865

18032.

JOSEPH M. WAGNER, Appellee,
vs.
THE CHICAGO AND ALTON RAILROAD COMPANY (a Corp.), Appellant.

Appeal Cook Circuit.

This day came appellant, by its counsel, and moved the Court for a certificate of importance and an appeal from the order and judgment of this Court in said cause to the Supreme Court of Illinois; and the Court being fully advised in the premises, doth order that said motion be and the same is hereby denied.

And afterwards, on the same day, to-wit, the 29th day of May, A. D. 1913, the following proceedings were had and entered of record in said cause, to-wit:

866 18032.

JOSEPH M. WAGNER, Appellee,
vs.
THE CHICAGO AND ALTON RAILROAD COMPANY (a Corp.), Appellant.

Appeal from Cook Circuit.

Error to ——.

The Court having considered the motion of appellant that the issuance of the mandate herein be stayed until the time for the filing of a petition in the Supreme Court of Illinois for a writ of certiorari to review the judgment of this Court in said cause shall have expired without any such petition having been filed, and if such petition for said writ shall have been filed within the proper time, then until said writ of certiorari shall have been granted or refused; and the Court, being fully advised in the premises, doth grant said motion and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

867 I, Alfred R. Porter, Clerk of the Appellate Court, in and for the First District of the State of Illinois, and keeper of the records, files and seals thereof, do hereby certify, That the foregoing is a true copy of the final order and judgment and all other proceedings of the said Appellate Court in the above entitled cause, of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Appellate Court, at Chicago, this twenty-ninth day of August, in the year of our Lord one thousand nine hundred and thirteen.

[SEAL.]

ALFRED R. PORTER,
Clerk of the Appellate Court of the First District, Illinois.

868 Supreme Court of Illinois, October Term, A. D. 1913.

No. —.

CHICAGO & ALTON RAILROAD COMPANY, Petitioner,
vs.
JOSEPH M. WAGNER, Respondent.

Writ of Certiorari to the Appellate Court, First District.

Honorable John McNutt, Trial Judge, Superior Court, Cook County.

Assignment of Errors by Petitioner.

Now comes petitioner, Chicago & Alton Railroad Company, and shows to the Court here that there is in the record herein manifest error, in this, to-wit:

1. The verdict and judgment of the trial court are contrary to the evidence.

2. The verdict and judgment of the trial court are contrary to the law.

3. The verdict and judgment of the trial court are contrary to the law and evidence.

4. The evidence is insufficient to support the verdict.

5. The trial court erred in admitting improper evidence offered by respondent, over the objection of petitioner.

6. The trial court erred in not excluding, upon motion of petitioner, improper evidence admitted on behalf of respondent.

7. The trial court erred in rejecting proper evidence offered by petitioner.

869 8. The trial court erred in refusing to receive in evidence offers of petitioner to produce certain evidence.

9. The trial court erred in denying the motion of petitioner, made at the close of respondent's evidence, to instruct the jury to return a verdict finding petitioner not guilty, and in refusing to give to the jury the instruction tendered to the court by petitioner with said motion, directing the jury to return a verdict in favor of petitioner.

10. The trial court erred in denying the motion of petitioner made at the close of all the evidence, to instruct the jury to return a verdict finding petitioner not guilty, and in refusing to give to the jury the instruction tendered by petitioner with said motion to the court, directing the jury to find petitioner not guilty.

11. The trial court erred in refusing to give to the jury each and every instruction requested by petitioner and marked Refused" by the court.

12. The trial court erred in giving to the jury each and every instruction requested by respondent and marked "Given" by the court.

13. The trial court erred in permitting respondent's attorney over the objection and exception of petitioner, to make improper remarks and arguments to and in the presence of the jury in the course of the trial, prejudicial to petitioner.

14. The verdict is excessive.

15. The verdict is the result of passion and prejudice on the part of the jury.

16. The trial court erred in ruling upon the improper remarks of respondent's attorney, made during the trial of the case.

17. The trial court erred in denying the motion of petitioner to exclude certain evidence because of a variance with the several counts of the declaration.

870 18. The trial court erred in submitting to the jury a certain special interrogatory, presented and requested by respondent.

19. The trial court erred in denying petitioner's motion to strike out certain testimony given on behalf of respondent, and in refusing to strike out such testimony.

20. The trial court erred in granting respondent's motion to exclude proper evidence introduced by petitioner, the striking out and

exclusion of which testimony was prejudicial to the rights and interests of petitioner.

21. The trial court erred in permitting respondent's attorney, over petitioner's objection, in his closing argument, to argue to the jury the question of injuries and damages, because counsel for petitioner did not in his argument, in answer to the opening argument of respondent's attorney, answer his contentions on those questions, or make any replies thereto.

22. The trial court erred in refusing to enforce the agreement made between petitioner's attorney and respondent's attorney, in reference to the Federal Employers' Liability Act, affecting the case, and in permitting respondent to offer in evidence and make proof that respondent was engaged in interstate commerce.

23. The trial court erred in denying petitioner's motion for a new trial, for the reason set forth in said motion.

24. The trial court erred in refusing to arrest the judgment rendered upon the verdict of the jury.

25. The Appellate Court for the First District erred in permitting a remittitur from the judgment of the trial court and in affirming the remainder of said judgment.

871 26. The Appellate Court for the First District erred in refusing to reverse the judgment of the trial court for the errors committed by the trial court and specifically assigned in said Appellate Court.

27. The judgment entered by the Appellate Court for the First District is contrary to the law.

28. The judgment of the Appellate Court for the First District is contrary to the evidence in the record.

Wherefore, for the reasons above set forth, and each of them, your petitioner respectfully submits that this Court should grant its writ of certiorari herein, and that on the hearing of the cause the judgments of said Appellate Court and said Superior Court should be reversed.

CHICAGO & ALTON RAILROAD COMPANY, *Petitioner,*
By WINSTON, PAYNE, STRAWN & SHAW, *Its Attorneys.*

Paid $7.50.

ALFRED R. PORTER, *Clerk.*

872 And afterwards, to-wit, on the Twenty-eighth day of October, A. D. 1913, the same being one of the days of the term of Court last aforesaid the following proceedings were had by said Court and entered of record in the words and figures following, to-wit:

No. 9198.

CHICAGO & ALTON RAILROAD COMPANY, Petitioner,
vs.
JOSEPH M. WAGNER, Respondent.

Certiorari First District.

And now on this day the Court having duly considered the petition for certiorari filed herein and the Court being now advised in the premises doth grant the prayer of the petition and it is ordered that writ of certiorari issue.

873 At a Supreme Court Begun and Held at Springfield, on Tuesday, the Second Day of December, in the Year of Our Lord One Thousand Nine Hundred and Thirteen, within and for the State of Illinois.

Present:

The Honorable George A. Cooke, Chief Justice.
Honorable Jas. H. Cartwright, Justice.
Honorable A. K. Vickers, Justice.
Honorable Frank K. Dunn, Justice.
Honorable Wm. M. Farmer, Justice.
Honorable Orrin N. Carter, Justice.
Honorable Charles C. Graig, Justice.
Patrick J. Lucey, Attorney General.
Warren C. Murray, Marshal.

Attest:
J. McCAN DAVIS, *Clerk*.

And afterwards to-wit, on the Twelfth day of November, A. D. 1913, the same being one of the days in vacation before the term of Court aforesaid, the Chicago & Alton Railroad Company, plaintiff in error, files briefs in the office of the Clerk of the Supreme Court of Illinois, and defendant in error, Joseph M. Wagner, files his brief in answer thereto on December 2, 1913.

874 And afterwards to-wit, on the Fifteenth day of December, A. D. 1913, the same being one of the days of the term of Court last aforesaid the following proceedings were by said Court had and entered of record in the words and figures following, to-wit:

No. 9198.

JOSEPH M. WAGNER, Defendant in Error,
vs.
CHICAGO & ALTON RAILROAD COMPANY, Plaintiff in Error.

Error to First District.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that Plaintiff in Error, hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said Defendant in error having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by Edw. W. Everett and J. S. Condit for plaintiff in error is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

874½ UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court Begun and Held at Springfield, on Tuesday, the Sixth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Fourteen, within and for the State of Illinois.

Present:

The Honorable James H. Cartwright, Chief Justice.
Honorable William M. Farmer, Justice.
Honorable Orrin N. Carter, Justice.
Honorable George A. Cooke, Justice.
Honorable Alonzo K. Vickers, Justice.
Honorable Frank K. Dunn, Justice.
Honorable Charles C. Craig, Justice.
Patrick J. Lucey, Attorney General.
Warren C. Murray, Marshal.

Attest:
J. McCAN DAVIS, *Clerk.*

Be it remembered, that afterward, to-wit: on the 16th day of October, 1914, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

No. 9198.

JOSEPH M. WAGNER, Defendant in Error,
v.
CHICAGO & ALTON RAILROAD COMPANY, Plaintiff in Error.

Error to First District.

Appeal from —.

875 Ag. 35.

Supreme Court of Illinois, December Term, A. D. 1913.

No. 9198.

JOSEPH M. WAGNER, Defendant in Error,
vs.
CHICAGO AND ALTON RAILROAD COMPANY, Plaintiff in Error.

Error to Appellate Court, First District.

Mr. Justice COOKE delivered the opinion of the Court:

Joseph M. Wagner, defendant in error, recovered a judgment in the Superior Court of Cook County against plaintiff in error, Chicago and Alton Railroad Company, for $15,000 for injuries alleged to have been sustained by him while employed by the Chicago, Burlington and Quincy Railroad Company as a conductor in charge of a switching crew operating an engine and five cars over a track of plaintiff in error. On appeal the Appellate Court for the First District required a remitttitur of $387.09 to be entered, and the judgment was affirmed as to the remainder. The judgment of the Appellate Court has been brought here for review by writ of certiorari.

On the trial plaintiff in error tendered a peremptory instruction, which was refused by the court. This action of the court is assigned as error on the ground that the evidence was insufficient to charge plaintiff in error in law with actionable negligence or to prove due care on the part of defendant in error.

The evidence on the part of defendant in error tended to prove that he had been in the employ of the Burlington company for twenty years as a number-taker, car-sealer, car-carder, switch-
876 man, timekeeper, and for the last four years as conductor in charge of a switching crew in Chicago. He was directed to take five baggage cars of the Great Northern Railway Company, which had come to Chicago on the Burlington road, and deliver them to the Erie Railroad Company at its Fifty-fifth street yards three or four miles distant. The cars were assembled, and in the course of the transfer over different roads the engine was pushing them over a Y-track which was a part of the plaintiff in error's Grove street tracks, connecting the tracks of the Pennsylvania and the Chicago and

Western Indiana Railroad Companies. This Y-track ran north-east, and the train entered it at its connection with the Pennsylvania tracks, at the south-west end, and it was going north-east to the connection with the Chicago and Western Indiana tracks. There were many tracks at the place, and there was a semaphore post sixteen feet high, four inches square and painted white, standing near the track, which had been erected and was maintained and operated by the Chicago and Western Indiana Railroad Company and was a part of the joint interlocking system. The plaintiff in error did not own or in any maner control the post or its location, and the post had been there for twelve years while cars were frequently passing over the tracks. The defendant in error was hanging on the side of the front baggage car, fifteen feet from the front end, where there was a door set back four or five inches from the side of the car, forming a recess. He was standing with his feet on the truss-iron under the bottom of the door or on a step below the door and was holding on by perpendicular grab-irons on the sides of the door. There was a controversy whether the track was straight near the semaphore or not, but the evidence for the defendant in error was that it was curved and he was on the inside of the curve. The train moved slowly over the Y and he could see the semaphore for at least one hundred feet, but he testified that it looked as if there was plenty of room until he came near the post, when he squeezed his body as tight
877 as he could to the car, but he was struck, thrown down and permanently injured. There was room enough between the semaphore and the end of the car as the defendant in error came near the post, but the chord or right line formed by the side of the car, which was sixty-five feet long, intersecting the curve brought the part of the car where the plaintiff was hanging nearer to the post.

The plaintiff in error had made all repairs on the track for twelve years, employed switchmen, who made a record of all the engines and cars passing over the track, and for at least five years had rendered bills to the Burlington company for trackage of its engines and cars, including two engines and five cars in the month of the accident. There was sufficient evidence of the plaintiff in error's ownership and control of the track, and the semaphore post had been in the same place for many years. If the post was in dangerous proximity to the track it was negligence on the part of the plaintiff in error to continue to operate trains, or to permit their operation by its licensee, with the dangerous obstruction, and the fact that the post was not erected nor maintained by the plaintiff in error would not relieve it from liability. (Illinois Terminal Railroad Co. vs. Thompson, 210 Ill. 226; South Side Elevated Railroad Co. vs. Nesvig, 214 Ill. 463.) The evidence tended to prove negligence of the plaintiff in error authorizing the submission of that issue to the jury.

On the question of the care exercised by the defendant in error he testified that the semaphore post was in plain sight for a considerable distance, and it was undisputed that he could have jumped off before reaching it, and it was not necessary for him to ride where he was, as there were other places of safety on the cars. A brake-

man with an air-gun or tail-hose was located at the front end of
878 the front car and was able to apply the air and stop the train.
There was evidence that defendant in error ought to be somewhere where he could signal the engineer, and the evidence tended to prove that there was room enough between the post and the end of the car, and it was within the fifteen feet that the car came too close to the post. Even if there was an error of judgment on the part of the defendant in error, it would depend upon the circumstances whether it amounted to negligence, since a mistake does not in all cases imply a want of ordinary care. (Chicago and Eastern Illinois Railroad Co. vs. O'Connor, 119 Ill. 586; North Chicago Street Railroad Co. vs. Dudgeon, 184 Ill. 477.) The law does not pronounce a party to be either negligent or free from negligence under the conditions shown by the evidence, and the court did not err in submitting the issue to the jury.

The original declaration charged that plaintiff in error and the Burlington company were common carriers and engaged in inter-state commerce; that defendant in error was employed as a switchman in such commerce by the Burlington company; that plaintiff in error owned the track on which the Burlington company, at the invitation and with the knowledge of plaintiff in error, operated its engine and cars, and that defendant in error was injured by a semaphore negligently placed or permitted to be placed alongside the track. Plaintiff in error filed a plea of the general issue and a special plea denying that it owned, possessed or operated the track or the semaphore. Later two additional counts were filed by leave of court in which no mention was made of inter-state commerce and there was no allegation that the engine or cars were engaged in such commerce, but the liability charged was based on common law
negligence. To the additional counts the same pleas were
879 filed as before; also a special plea of the statute of limitations.
The defendant in error's demurrer to the plea of the statute of limitations was sustained, and the case was called for trial. In the course of the trial evidence was offered on the part of defendant in error tending to prove that the engines and cars were engaged in inter-state commerce, when an objection was interposed on the ground that the question of inter-state commerce had been eliminated and the demurrer to the plea of the statute of limitations sustained by agreement. While this stipulation or agreement does not appear in the bill of exceptions, it does satisfactorily appear from what followed when this objection was made that such an agreement had been entered into. The evidence that had been offered on this question was then stricken out by the court and no further evidence relating to inter-State commerce was offered. Whether there was such an agreement or not is not material so far as the case made by defendant in error in the first instance is concerned. Defendant in error had no cause of action against plaintiff in error under the Federal Employers' Liability act, as that act applies only where the relation of master and servant exists. To meet the case of defendant in error, the plaintiff in error proved that he was and had been since 1902 a member of the relief department of the Burlington company;

that the employees of that company made monthly contributions to the relief fund; that the company maintained the department and bore the operating expenses and that he had accepted from the relief fund as benefits the sum of $1,231, and that $1,349.59 had been paid in his behalf for hospital bills, physicians' services, and the like. Of these amounts the Burlington company had con-
880 tributed not to exceed fifteen per cent, or $379.09—the amount for which the Appellate Court required defendant in error to file a remittitur. In rebuttal defendant in error was permitted to prove that at the time he was injured the engine and cars were engaged in inter-State commerce. The court gave at the instance of defendant in error an instruction that if the jury found plaintiff in error guilty then in the assessment of damages they should not credit the plaintiff in error with what the Burlington relief department had paid to the defendant in error or to any doctor or association on his account. The admission of this evidence in rebuttal and the giving of this instruction are assigned as error.

There can be but one satisfaction for an injury, and if defendant in error made a settlement with the Burlington Company and released it from further liability, it was a release also of plaintiff in error from all liability, as the Burlington company was a joint tort feasor. The contract of defendant in error with the relief department provided that the voluntary acceptance by him of benefits after receiving an injury should operate as a satisfaction of further claims against the employer on account of such injury, and it is the law of this State that such an acceptance with the knowledge that the contract contained such a provision operates as a satisfaction and bar to a subsequent suit for damages. (Eckman vs. Chicago, Burlington and Quincy Railroad Co. 169 Ill. 312.) The State law in this regard has been modified, however, by the Federal Employers' Liability act as to cases where injuries are received by certain employees of an employer engaged in interstate commerce. The Fed-
eral act provides that any contract, rule, regulation or device
881 whatsoever the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by the act shall to that extent be void, provided that in any action brought against any such common carrier under the act such common carrier may set off any sum it has contributed or paid to any insurance, relief, benefit or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which the action is brought. Prior to the passage of the Federal Employers' Liability act the laws of the several states were determinative of the liability of employers engaged in inter-state commerce for injuries received by their employees while engaged in such commerce. That was because Congress had not acted, and because the subject is one which falls within the police power of the states in the absence of action by Congress. Now that Congress has acted, the laws of the states in so far as they cover the same field are superseded by the Federal act. Mondou vs. New York, New Haven and Hartford Railroad Co. 223 U. S. 1;

Michigan Central Railroad Co. vs. Vreeland, 227 U. S. 59; St. Louis and San Francisco Railway Co. vs. Hesterly, 228 U. S. 702.

Whether it had been stipulated during the presentation of defendant in error's case in chief that the question of inter-State commerce was not in the case, is immaterial. That stipulation simply left the case as though no such allegation had been made in the declaration. When plaintiff in error attempted to prove a satisfaction by the payment of benefits by its joint tort feasor, the Burlington Company, to defendant in error, it was proper for defendant in error in rebuttal to show that no valid release had been given the Burlington company by him. As between defendant in error and the Burlington company, the Federal Employers' Liability act clearly applied, and if, as the United States Supreme Court
882 has repeatedly held, that law supersedes all State laws on the subject, then the release given by defendant in error to the Burlington company was not valid, and would not have precluded recovery by him from that company. If it was not valid so far as the Burlington company was concerned, it was clearly invalid as to plaintiff in error and constituted no defense to this action.

The evidence in rebuttal was properly admitted. The court erred in giving the instruction complained of, but that error was cured by the remittitur required and entered in the Appellate Court.

Complaint is made of alleged improper remarks of counsel for defendant in error, but we perceive nothing in this record that would warrant a reversal of the judgment.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

883 No. 9198.

WAGNER
v.
CHICAGO & ALTON RAILROAD COMPANY.

CARTWRIGHT, *C. J.*, and DUNN, *J.*, dissenting:

The bill of exceptions shows that the plaintiff withdrew all questions relating to interstate commerce for the purpose of having a demurrer disposed of and having an immediate trial, and all claims growing out of any act regulating interstate commerce were thereby eliminated from the case. When the agreement was made known to the trial court, the evidence that had been admitted tending to prove that the engine and cars were engaged in interstate commerce was stricken out by the court and no evidence relating to that subject remained in the record. Without the agreement the plaintiff had no cause of action against the defendant under the Federal Employers' Liability Act, which only applies where the relation of master and servant exists, and to maintain an action under the act it is necessary to allege and prove the existence of that relation. The only mention made of interstate commerce was in the original declaration, consisting of a single count, which charged that the defendant and the Chicago, Burlington & Quincy Railroad Co. were

common carriers engaged in interstate commerce; that plaintiff was employed as switchman in such commerce by the Burlington Company; that the defendant owned the track upon which the Burlington Company at the invitation and with the knowledge of the defendant operated its engines and cars, and that the plaintiff was injured by a semaphore negligently caused or permitted to be placed along the side of the track. There was no averment that the plaintiff was an employe of the defendant, but on the contrary it was averred that he was employed by the Burlington Company, and the evidence showed that he was not an employe of the
884 defendant. So there was neither averment nor proof constituting a cause of action under the Federal Employers' Liability Act. The only cause of action alleged or proved was created by the law of this state, and, although the plaintiff could only recover under that law, the opinion of the majority is that the defendant was rightfully denied its defense under the same law.

There can be but one satisfaction for an injury, and if the defendant was liable the Burlington Company was also liable and a joint tort-feasor with it. The Burlington Company had been running over this track in its existing condition for many years, had obtained the right to use and had used it in making deliveries to other railroads, and almost every month for at least five years had received a bill rendered by the defendant for the use of it. The Burlington Company was chargeable with notice of the existing conditions, and if there was a cause of action against the defendant there was a cause of action for the same injury against the Burlington Company. One was owner and the other licensee, and neither one erected, maintained or controlled the semaphore. One was as much liable for an injury from its location as the other, so that a satisfaction as to one would have the same effect as to both. City of Chicago v. Babcock 143 Ill. 358; West Chicago Street Ry. Co. v. Piper, 165 id. 325; Walner v. Union Traction Co. 245 id. 148.

It is admitted by counsel and was confessed by the remittitur in the Appellate Court that the sums paid to and accepted by the plaintiff were to inure to the benefit of the defendant as a joint tort-feasor with the Burlington Company, and the defendant, to show a release of the cause of action, proved the following facts.
885 The plaintiff was, and since 1902 had been, a member of the relief department of the Burlington Company, and employes of that Company made monthly contributions to the relief fund. The Company maintained the department and bore the operating expenses; and during the years 1908, 1909 and 1910 contributed to the fund without reimbursement $244,000. The plaintiff had received from the relief on account of his injury $1,231 for benefits and $1,349.50 paid for hospital bills, physician's services, and the like, and was still receiving similar benefits from the fund and would continue to receive them while disabled. It is the law of this state that a voluntary acceptance by a railroad employe after receiving an injury of the benefits provided for in his contract of membership in the relief department of his employer with knowledge that the contract provides such acceptance shall operate as a

satisfaction of further claims against the employer on account of such injury, operates as a satisfaction and a bar to a subsequent suit for damages. This was decided in Eckman v. Chicago, Burlington & Quincy Ry. Co. 169 Ill. 312, following the general current of authorities in other states on the same subject. It was there held that such a contract by which an employe receives at once and without dispute or question a sum of money, perhaps less than he might prove in an action against the employer, at the end of litigation with the attending delays and expenses, and perhaps a division with attorneys, is not contrary to the public policy of the state. The facts proved by the defendant were sufficient to establish under the law of this state a satisfaction by the Burlington Company of the plaintiff's injury and damages, and the evidence admitted in rebuttal was for the purpose of destroying that defense by means of the Federal Employers' Liability Act, which gave no cause of action to the plaintiff and under which the suit was not and could not have been
886 brought. Congress has supreme control over the subject of commerce between the several states and no one disputes the proposition that whenever suit is brought and facts are averred which constitute a cause of action under an act of Congress relating to that subject, the act supersedes all legislation over the same subject by the states, but Congress cannot and has not attempted to determine what shall be the policy of a state or what its laws shall be. There is no act of Congress which would give any right of action in favor of the plaintiff against the defendant, whether engaged in interstate commerce or not; Congress has not legislated on that subject at all. In an action brought under the state law, the defendant is as much entitled to the benefit of the law as the plaintiff. If the law of this state was good for the purpose of recovery it was equally good to establish a defense against the cause of action existing under the same law. To say that a law regulating the rights and duties of parties and giving a right of action for a violation of such rights and duties and declaring what shall be a release of such right of action is available for sustaining the action and not available for a defense, is to destroy that equality of right which the law is intended to and must preserve. While the federal statute supersedes the law of the state as to employer and employe when engaged in interstate commerce, it only supersedes such law where allegations constituting a cause of action under it are made and proved. In the case of Mondou v. New York, New Haven & Hartford R. R. Co. 223 U. S. 1, the opinion was delivered in four cases and the right of action in each was based solely on the act of congress. The case of Michigan Central R. R. Co. v. Freeland, 227 U. S. 59, presented exactly
887 the same condition. The proviso to section 5 of the federal statute allowing the employer to set off any sum it has contributed to a relief benefit or indemnity fund is expressly limited to actions brought under or by virtue of the provisions of the act, and neither that proviso nor anything contained in the act relates in any way to an action brought under a state law. If the plaintiff had sued his employer, the Burlington Company, and alleged that the injury occurred while the engines and cars were engaged in

interstate commerce, the federal statute would apply and the employer could only set off against the damages the sum contributed to the relief fund, but if the plaintiff had brought this suit against the Burlington Company, the evidence of membership in the relief department and the receipt of benefits would have established a satisfaction for the injury and have been a complete defense. We do not agree with the majority that a plaintiff may bring an action under the law of one jurisdiction and prevent a valid defense under that law by invoking the law of another and different jurisdiction. The cause of action having been released, we think the judgment of the Appellate Court should be reversed and the cause remanded to the Superior court.

888 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court Begun and Held at Springfield on Tuesday, the Sixth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Fourteen, within and for the State of Illinois.

Present:

The Honorable James H. Cartwright, Chief Justice.
Honorable William M. Farmer, Justice.
Honorable Orrin N. Carter, Justice.
Honorable George A. Cooke, Justice.
Honorable Alonzo K. Vickers, Justice.
Honorable Frank K. Dunn, Justice.
Honorable Charles C. Craig, Justice.
Patrick J. Lucey, Attorney General.
Warren C. Murray, Marshal.

Attest:

J. McCAN DAVIS, *Clerk.*

Be it remembered, that to-wit:—on the 16th day of October, A. D. 1914, the same being one of the days of the said October term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

October 16th, A. D. 1914.

No. 9198.

JOSEPH M. WAGNER, Defendant in Error,
v.
CHICAGO & ALTON RAILROAD COMPANY, Plaintiff in Error.

Appeal from —.

Error to First District.

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for Error, and now being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Judgment aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error:

Therefore, it is considered by the Court that the Judgment of the Appellate Court aforesaid be Affirmed in all things, and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said Defendant in Error recover of and from the said Plaintiff in Error costs by him in this behalf expended, to be taxed, and that he have execution therefor.

889 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court Begun and Held at Springfield on Tuesday, the Second Day of December, in the Year of Our Lord One Thousand Nine Hundred and Fourteen, within and for the State of Illinois.

Present:

The Honorable James H. Cartwright, Chief Justice.
Honorable William M. Farmer, Justice.
Honorable Orrin N. Carter, Justice.
Honorable George A. Cooke, Justice.
Honorable Alonzo K. Vickers, Justice.
Honorable Frank K. Dunn, Justice.
Honorable Charles C. Craig, Justice.
Patrick J. Lucey, Attorney General.
Warren C. Murray, Marshal.

Attest:

CHARLES W. VAIL, *Clerk.*

Be it remembered, that to-wit, on the Second day of December, A. D. 1914, the same being one of the days of the term of Court last

aforesaid, the following proceedings were by said Court had and entered of record in the words and figures following, to-wit:

No. 9198.

JOSEPH M. WAGNER, Defendant in Error,
vs.
CHICAGO & ALTON RAILROAD COMPANY, Plaintiff in Error.

Error First District.

And now on this day the Court having duly considered the petition for rehearing filed by plaintiff in error and the Court being now advised in the premises doth overrule the prayer of the petition and denies a rehearing of this cause.

890 In the Supreme Court of the United States and in the Supreme Court of the State of Illinois.

No. 9198.

JOSEPH M. WAGNER, Defendant in Error (Now Defendant in Error),
vs.
CHICAGO AND ALTON RAILROAD COMPANY, Plaintiff in Error (Now Plaintiff in Error).

Authentication of Record.

I, Charles W. Vail, Clerk of the Supreme Court of the State of Illinois, do hereby certify that the above and foregoing consisting of the cover and pages 1 to 889, both inclusive, is a true, perfect and complete transcript of the record and proceedings in the case of Joseph M. Wagner, defendant in error, vs. The Chicago and Alton Railroad Company, plaintiff in error, and also of the Opinion of the Court rendered therein as the same now appear on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Supreme Court of Illinois at Springfield in said State this 20th day of February, A. D. 1915.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHAS. W. VAIL,
Clerk of the Supreme Court of the State of Illinois.

Filed Jan. 30, 1915. Chas. W. Vail, Clerk Supreme Court.

891 Be it remembered, that to-wit, on the Thirtieth day of January, 1915, there was duly filed by the plaintiff in error, Chicago & Alton Railroad Company, in the office of the Clerk of the Supreme Court of Illinois, a petition for writ of error with as-

signments of error from the Supreme Court of the United States to the Supreme Court of Illinois addressed to the Hon. James H. Cartwright, Chief Justice of the Supreme Court of Illinois, with the original order by the said Chief Justice upon the said petition allowing said writ of error, which document is in the words and figures as follows, to-wit:

892 In the Supreme Court of the United States and in the Supreme Court of the State of Illinois.

No. 9198.

JOSEPH M. WAGNER, Defendant in Error (Now Defendant in Error),

vs.

CHICAGO AND ALTON RAILROAD COMPANY, Plaintiff in Error (Now Plaintiff in Error).

Petition for Writ of Error.

Filed Jan. 30, 1915. Chas. W. Vail, Clerk of Supreme Court.

To the Honorable the Chief Justice of the Supreme Court of the State of Illinois:

The petitioner, the Chicago and Alton Railroad Company, respectfully shows that on the sixteenth day of October, A. D. 1914, the Supreme Court of Illinois entered judgment herein in favor of the defendant in error (now defendant in Error) and against plaintiff in Error (now plaintiff in error), which said judgment was in the words and figures following, as will appear by reference to the records and proceedings in said cause.

893 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court Begun and Held at Springfield on Tuesday, the Sixth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Fourteen, within and for the State of Illinois.

Present:

The Honorable James H. Cartwright, Chief Justice.
The Honorable William M. Farmer, Justice.
The Honorable Alonzo K. Vickers, Justice.
The Honorable Frank K. Dunn, Justice.
The Honorable Orrin N. Carter, Justice.
The Honorable George A. Cooke, Justice.
The Honorable Charles C. Craig, Justice.
Patrick J. Lucey, Attorney General.
Warren C. Murray, Marshal.

Attest:
J. McCAN DAVIS, *Clerk.*

Be it remembered, That on, to-wit: the sixteenth day of October, A. D. 1914, the same being one of the days of the said October Term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following to-wit:

894 No. 9198.

JOSEPH M. WAGNER, Defendant in Error,
vs.
CHICAGO AND ALTON RAILROAD COMPANY, Plaintiff in Error.

Error to First District.

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well *as* the Record and proceedings aforesaid, as the matters and things therein assigned for error, and now being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error:

Therefore it is considered by this Court that the judgment of the Appellate Court be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said defendant in error recover of and from the said plaintiff in error costs by him in his behalf expended to be taxed and that he have execution therefor.

895 That prior to the entry of said judgment, on the 16th day of October, A. D. 1914, an opinion had been filed in said

cause, by this Court affirming the judgment of the Appellate Court of the First District of the State of Illinois in said cause, a copy of which opinion is hereto attached marked "Exhibit 1," and thereafter a petition for rehearing was filed in said cause by plaintiff in error (now plaintiff in error), a copy of which petition for rehearing is hereto attached marked "Exhibit 2."

That thereafter a rehearing in said cause was denied by said Supreme Court of Illinois by order entered on the second day of December, A. D. 1914.

And plaintiff in error, your petitioner, respectfully shows that there was a judgment in said cause in the Superior Court in and for the County of Cook in the State of Illinois in favor of defendant in error (now defendant in Error) and against your petitioner for the sum of Fifteen Thousand Dollars ($15,000.00) and costs of suit, from which said judgment upon appeal to the Appellate Court of the First District of the State of Illinois there was required a remittitur of Three Hundred and Seven Dollars and Nine cents ($307.09) and that judgment was affirmed as to the remainder, by said court, which judgment of said Appellate Court, upon review by writ of certiorari, was affirmed by the Supreme Court of the State of Illinois.

And your petitioner further respectfully shows that the said Supreme Court of the State of Illinois is the highest court of the State of Illinois in which a decision in said cause could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under the Statutes of the United States authorizing writs of error to State Courts, inasmuch as in said judgment of said Supreme Court of Illinois and the proceedings in said cause, certain errors were committed to the prejudice of petitioner, all of which will more
896 in detail appear from the assignment of errors which is filed with this petition.

And because by the said judgment of said Supreme Court of Illinois there was denied to your petitioner a title, right, privilege or immunity claimed by your petitioner in the proceedings in said cause under a statute of the United States and an authority exercised under the United States.

And because plaintiff in error (now plaintiff in error) claimed in said cause that Section Five (5) of an Act of Congress entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases,' (35 Stat. 65, Ch. 149), hereinafter referred to as 'The Federal Employers' Liability Law' was not applicable in said cause, which said claim of a right, title or immunity under said act of Congress was denied to your petitioner by said judgment of said Supreme Court of the State of Illinois.

And because plaintiff in error (now plaintiff in error) claimed in said cause that Section Five (5) of 'The Federal Employers' Liability Law' was in no way applicable to an action brought under a state law, which said claim of a right, title or immunity under said act of Congress was denied to your petitioner by said judgment of said Supreme Court of the State of Illinois.

And because plaintiff in error (now plaintiff in error) claimed in said cause that Section Five (5) of 'The Federal Employers' Liability Law' should be so construed as not to permit any person to claim the invalidity of any contract, rule, regulation or device mentioned therein, unless such person contested their validity in an action brought under said act, which said claim of a right, title or immunity under said act of Congress was denied to your petitioner by said judgment of said Supreme Court of the State of Illinois.

And because plaintiff in error (now plaintiff in error) claimed in said cause that Section Five (5) of 'The Federal Employers' Liability Law' should be so construed as not to invali-
897 date any contract, rule, regulation or device, the purpose or intent of which was to enable any common carrier to exempt itself from any liability created by that act unless the validity of such contract, rule, regulation or device was claimed by the employer liable under said act, which said claim of a right, title or immunity under said act of Congress was denied to your petitioner by said judgment of said Supreme Court of the State of Illinois.

And because plaintiff in error (now plaintiff in error) claimed in said cause that Section Five (5) of the "Federal Employers' Liability Law" should be so construed as not to invalidate any contract, rule, regulation or device mentioned therein unless the invalidity of such contract, rule, regulation or device was contended for by an employee in an action brought by the employee against his employer to establish a liability created by said law, which said claim of a right, title or immunity under said act of Congress was denied to your petitioner by said judgment of said Supreme Court of the State of Illinois.

And because plaintiff in error (now plaintiff in error) claimed in said cause that Section Five (5) of the "Federal Employers' Liability Law" should be so construed as only to invalidate any contract, rule, regulation or device mentioned therein, insofar as they operated as a release of a liability created by the act, and not to invalidate them insofar as the acceptance of benefits thereunder operated as a release of a liability not created by the act, of a person other than the maker's employer, which said claim of a right, title or immunity under said act of Congress was denied to your petitioner by said judgment of said Supreme Court of the State of Illinois.

And because plaintiff in error (now plaintiff in error) claimed in said cause that Section Five (5) of the "Federal Employers' Liability Law" should be so construed as not to invalidate a contract, rule, regulation or device, the purpose or intent of
898 which was to enable any common carrier to exempt itself from any liability created by that act, or as to prevent the acceptance of relief benefits under said contract, etc., from operating as a release at common law, when such acceptance and consequent release was relied upon by one who was a joint tort feasor with the employer as a release of his own liability outside of said

Federal act, which said claim of a right, title or immunity under said act of Congress was denied to your petitioner by said judgment of said Supreme Court of the State of Illinois.

And because plaintiff in Error (now plaintiff in Error) claimed in said cause that Section Five (5) of the "Federal Employers' Liability Law" should be so construed as to permit it to defend successfully said cause by proving (1) the contract of defendant in Error with the Relief Department of the Burlington Railroad Company, (2) the provision therein that the voluntary acceptance by defendant in Error of benefits therefrom after having received an injury should operate as a satisfaction of further claims against said company on account of such injury, (3) the acceptance by defendant in Error of such benefits after having received an injury, (4) his release thereby of the Burlington Railroad Company, and consequently, (5) under the common law, his release of any liability on the part of the plaintiff in Error, a joint tortfeasor with said Burlington Railroad Company, although had the said Burlington Railroad Company been sued by defendant in Error under the provisions of said act on a liability created thereby, it could not have successfully made such defense, which said claim of a right, title or immunity under said act of Congress was denied to your petitioner by said judgment of said Supreme Court of the State of Illinois.

And because plaintiff in Error (now plaintiff in Error) claimed in said cause that Section Five (5) of "The Federal Employers' Liability Law" did not supersede the common law of the State of Illinois applicable in an action not brought under the Act, which said claim of a right, title or immunity under said act of Congress was denied to your petitioner by said judgment of said Supreme Court of the State of Illinois.

And because plaintiff in Error (now plaintiff in Error) claimed in said cause that Section Five (5) of "The Federal Employers' Liability Law" did not supersede the common law of the State of Illinois applicable in an action not brought under the Act, which said claim of a right, title or immunity under said act of
899 Congress was denied to your petitioner by said judgment of said Supreme Court of the State of Illinois.

And because plaintiff in Error (now plaintiff in Error) claimed in said cause that Section Five (5) of "The Federal Employers' Liability Law" was not legislation by Congress in the field of actions against railroads brought by persons other than their employees, which said claim of a right, title or immunity under said act of Congress was denied to your petitioner by said judgment of said Supreme Court of the State of Illinois.

And because plaintiff in Error (now plaintiff in Error) claimed in said cause that Section Five (5) of "The Federal Employers' Liability Law" did not determine the public policy of the State of Illinois in actions brought against railroad companies by persons not employed by such companies, which said claim of a right, title or immunity under said act of Congress was denied to your peti-

tioner by said judgment of said Supreme Court of the State of Illinois.

Wherefore, plaintiff in Error, your petitioner, claims and says that by a final judgment in said suit in the highest court in the State of Illinois, in which a decision in said suit could be had, there was a right, title, privilege or immunity which was specially set up and claimed under a statute of the United States by your petitioner, and the decision of said court was against such right, title, privilege or immunity which was so specially set up and claimed by your petitioner under such statute, and wherefore and in accordance with the statute in such case made and provided therefor, your petitioner prays that a writ of error may issue in this behalf out of the Supreme Court of the United States, for the correction of the errors, an assignment whereof is filed with this petition, and that a transcript of the record, proceedings, files and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

And your petitioner, plaintiff in Error, prays for the allowance of a citation and supersedeas in due form of law, and that
900 execution upon said judgment of the Supreme Court of the State of Illinois and levy of such execution may be stayed until the further order of the court.

And Plaintiff in Error, your petitioner (now plaintiff in Error) will ever pray, etc.

THE CHICAGO AND ALTON RAILROAD COMPANY,
Petitioner, Formerly Plaintiff in Error in said Cause, Now Plaintiff in Error,
By SILAS H. STRAWN,
EDWARD W. EVERETT,
J. SIDNEY COUDET,
Its Attorneys.

901 EXHIBIT 1.

JOSEPH M. WAGNER, Defendant in Error,
vs.
THE CHICAGO AND ALTON RAILROAD COMPANY, Plaintiff in Error.

Mr. Justice COOKE delivered the opinion of the court:

Joseph M. Wagner, the defendant in error, recovered a judgment in the Superior Court of Cook County against the plaintiff in error, Chicago and Alton Railroad Company, for $15,000 for injuries alleged to have been sustained by him while employed by the Chicago, Burlington and Quincy Railroad Company as a conductor in charge of a switching crew*ing* operating an engine and five cars over a track of plaintiff in error. On appeal the Appellate Court for the First District required a remittitur of $387.09 to be entered and the judgment was affirmed as to the remainder. The judgment of the Appellate Court has been brought here for review by writ of certiorari.

On the trial plaintiff in error tendered a peremptory instruction, which was refused by the court. This action of the court is assigned as error, on the ground that the evidence was insufficient to charge plaintiff in error, in law, with actionable negligence or to prove due care on the part of defendant in error.

The evidence introduced on the part of the defendant in error tended to prove that he had been in the employ of the Burlington company for twenty years as a number-taker, car-sealer, car-carder, switchman, timekeeper, and for the last four years as conductor in charge of a switching crew in Chicago. He was directed to take five baggage cars of the Great Northern Railway Company, which had come to Chicago on the Burlington road, and deliver them to the Erie Railroad Company at its Fifty-fifth street yards, three or four miles distant. The cars were assembled, and in the course of the transfer over different roads the engine was pushing them over a Y-track which was a part of plaintiff in error's Grove street tracks, connecting the tracks of the Pennsylvania and the Chicago and Western Indiana Railroad Companies. This Y-track ran north-east, and the train entered it at its connection with the Pennsylvania tracks, at the south-west end, and it was going north-east to the connection with the Chicago and Western Indiana tracks. There were many tracks at the place, and there was a semaphore post sixteen feet high, four inches square and painted white, standing near the track, which had been erected, and was maintained and operated by the Chicago and Western Indiana Railroad Company and was a part of the joint interlocking system. Plaintiff in error did not own or in any manner control the post or its location, and the post had been there for twelve years while cars were frequently passing over the tracks. Defendant in error was hanging on the side of the front baggage car, fifteen feet from the front end, where there was a door set back four or five inches from the side of the car, forming a recess. He was standing with his feet on the truss-iron under the bottom of the door or on a step below the door and was holding on
902 by perpendicular grab-irons on the sides of the door. There was a controversy whether the track was straight near the semaphore or not, but the evidence for defendant in error was that it was curved and he was on the inside of the curve. The train moved slowly over the Y and he could see the semaphore for at least one hundred feet, but he testified that it looked as if there was plenty of room until he came near the post, when he squeezed his body as tight as he could to the car, but he was struck, thrown down and permanently injured. There was room enough between the semaphore and the end of the car as defendant in error came near the post, but the chord or right line formed by the side of the car, which was sixty-five feet long, intersecting the curve brought the part of the car where defendant in error was hanging nearer to the post.

Plaintiff in error had made all repairs on the track for twelve years, employed switchmen, who made a record of all the engines and cars passing over the tracks, and for at least five years had rendered bills to the Burlington company for trackage of its engines and cars, including two engines and five cars in the month of the accident. There was sufficient evidence of plaintiff in error's owner-

ship and control of the track, and the semaphore post had been in the same place for many years. If the post was in dangerous proximity to the track it was negligence on the part of plaintiff in error to continue to operate trains, or to permit their operation by its licensee, with the dangerous obstruction, and the fact that the post was not erected nor maintained by plaintiff in error would not relieve it from liability. (Illinois Terminal Railroad Co. v. Thompson, 210 Ill. 226; South Side Elevated Railroad Co. v. Nesvig, 214 id. 463.) The evidence tended to prove negligence of plaintiff in error authorizing the submission of that issue to the jury.

On the question of the care exercised by defendant in error, he testified the semaphore post was in plain sight for a considerable distance, and it was undisputed that he could have jumped off before reaching it, and it was not necessary for him to ride where he was, as there were other places of safety on the cars. A brakeman with an air-gun or tail-hose was located at the front end of the front car and was able to apply the air and stop the train. There was evidence that defendant in error ought to be somewhere where he could signal the engineer, and the evidence tended to prove that there was room enough between the post and the end of the car, and it was within the fifteen feet that the car came too close to the post. Even if there was an error of judgment on the part of defendant in error, it would depend upon the circumstances whether it amounted to negligence, since a mistake does not in all cases imply a want of ordinary care. (Chicago and Eastern Illinois Railroad Co. v. O'Connor, 119 Ill. 586; North Chicago Street Railroad Co. v. Dudgeon, 184 id. 477.) The law does not pronounce a party to be either negligent or free from negligence under the conditions shown by the evidence and the court did not err in submitting the issue to the jury.

The original declaration charged that plaintiff in error and the Burlington company were common carriers and engaged in interstate commerce; that defendant in error was employed as a switchman in such commerce by the Burlington Company; that plaintiff in error owned the track on which the Burlington company, at the invitation and with the knowledge of plaintiff in error, op-
903 erated its engine and cars, and that defendant in error was injured by a semaphore negligently placed or permitted to be placed alongside the track. Plaintiff in error filed a plea of the general issue and a special plea denying that it owned, possessed or operated the track or the semaphore. Later two additional counts were filed by leave of court in which no mention was made of inter-State commerce, and there was no allegation that the engine or cars were engaged in such commerce but the liability charged was based on common law negligence. To the additional counts the same pleas were filed as before; also a special plea of the Statute of Limitations. The defendant in error's demurrer to the plea of the Statute of Limitations was sustained and the case was called for trial. In the course of the trial evidence was offered on the part of defendant in error tending to prove that the engines and cars were engaged in inter-State commerce, when an objection was interposed on the ground that the question of inter-State commerce had been eliminated and

the demurrer to the plea of the Statute of Limitations sustained by agreement. While this stipulation or agreement does not appear in the bill of exceptions, it does satisfactorily appear from what followed when this objection was made that such an agreement had been entered into. The evidence that had been offered on this question was then stricken out by the court and no further evidence relating to inter-State commerce was offered. Whether there was such an agreement or not is not material, so far as the case made by defendant in error in the first instance is concerned. Defendant in error had no cause of action against plaintiff in error under the Federal Employers' Liability act, as that act applied only where the relation of master and servant exists, to meet the case of defendant in error, the plaintiff in error proved that he was, and had been since 1902, a member of the relief department of the Burlington Company; that the employees of that company made monthly contributions to the relief fund; that the company maintained the department and bore the operating expenses, and that he had accepted from the relief fund, as benefits, the sum of $1,231, and that $1,349.59 had been paid in his behalf for hospital bills, physicians' services, and the like. Of these amounts the Burlington company had contributed not to exceed fifteen per cent, or $379.09—the amount for which the Appellate Court required defendant in error to file a remittitur. In rebuttal defendant in error was permitted to prove that at the time he was injured the engine and cars were engaged in inter-State commerce. The court gave, at the instance of defendant in error, an instruction that if the jury found plaintiff in error guilty, then, in the assessment of damages, they should not credit the plaintiff in error with what the Burlington relief department had paid to the defendant in error or to any doctor or association on his account. The admission of this evidence in rebuttal and the giving of this instruction are assigned as error.

There can be but one satisfaction for an injury, and if defendant in error made a settlement with the Burlington company and released it from further liability, it was a release, also, of plaintiff in error from all liability, as the Burlington company was a joint tort feasor. The contract of defendant in error with the relief department provided that the voluntary acceptance by him of benefits after receiving an injury should operate as a satisfaction of further claims against the employer on account of such injury, and it is the law of this State that such an acceptance, with the knowledge that the contract contained such a provision, operates as a satisfaction and bar to a subsequent suit for damages. (Eckman v. Chicago, Burlington, and Quincy Railroad Co. 169 Ill. 312). The State law in this regard has been modified, however, by the Federal Employers' Liability act as to cases where injuries are received by certain employees of an employer engaged in inter-State commerce. The
904 Federal act provides that any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by the act, shall to that extent be void, provided that in any action brought against any such common carrier under the act

such common carrier may set off any sum it has contributed or paid to any insurance, relief, benefit or indemnity that may have been paid to the injured employee or the person entitled thereto, on account of the injury or death for which that action is brought. Prior to the passage of the Federal Employers' Liability act the laws of the several States were determinative of the liability of employers engaged in inter-State commerce, for injuries received by their employees while engaged in such commerce. That was because Congress had not acted and because the subject is one which falls within the police power of the States in the absence of action by Congress. Now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded by the Federal act. Mondou v. New York, New Haven and Hartford Railroad Co., 223 U. S. 1; Michigan Central Railroad Co. v. Vreeland, 227 id., 59; St. Louis and San Francisco Railway Co. v. Hesterly, 228 Id. 702.

Whether it had been stipulated, during the presentation of the defendant in error's case in chief, that the question of inter-State commerce was not in the case is immaterial. That stipulation simply left the case as though no such allegation had been made in the declaration. When plaintiff in error attempted to prove a satisfaction by the payment of benefits by its joint tort feasor, the Burlington company, to defendant in error, it was proper for defendant in error, in rebuttal, to show that no valid release had been given the Burlington company by him. As between defendant in error and the Burlington company the Federal Employers' Liability act clearly applied, and if, as the United States Supreme Court has repeatedly held, that law supersedes all State laws on the subject, then the release given by defendant in error to the Burlington company was not valid and would not have precluded recovery by him from that company. If it was not valid so far as the Burlington company was concerned, it was clearly invalid as to plaintiff in error and constituted no defense to this action.

The evidence in rebuttal was properly admitted. The court erred in giving the instruction complained of, but that error was cured by the remittitur required and entered in the Appellate Court.

Complaint is made of alleged improper remarks of counsel for defendant in error, but we perceive nothing in this record that would warrant a reversal of the judgment.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

905 CARTWRIGHT, *C. J.*, and DUNN, *J.*, dissenting:

The bill of exceptions shows that the plaintiff withdrew all questions relating to inter-State commerce for the purpose of having a demurrer disposed of and having an immediate trial, and all claims growing out of any act regulating inter-State commerce were thereby eliminated from the case. When the agreement was made known to the trial court, the evidence that had been admitted tending to prove that the engine and cars were engaged in inter-State commerce was stricken out by the court and no evidence relating to that subject remained in the record. Without the agreement the plaintiff had

no cause of action against the defendant under the Federal Employers' Liability act, which only applies where the relation of master and servant exists, and to maintain an action under the act it is necessary to allege and prove the existence of that relation. The only mention made of inter-State commerce was in the original declaration, consisting of a single count, which charged that the defendant and the Chicago, Burlington and Quincy Railroad Company were common carriers engaged in inter-State commerce; that the plaintiff was employed as switchman in such commerce by the Burlington company; that the defendant owned the track upon which the Burlington company, at the invitation and with the knowledge of the defendant, operated its engines and cars, and that the plaintiff was injured by a semaphore negligently caused or permitted to be placed along the side of the track. There was no averment that the plaintiff was an employee of the defendant, but, on the contrary, it was averred that he was employed by the Burlington company, and the evidence showed that he was not an employee of the defendant, so there was neither averment nor proof constituting a cause of action under the Federal Employers' Liability act. The only cause of action alleged or proved was created by the law of this State, and, although the plaintiff could only recover under that law, the opinion of the majority is that the defendant was rightfully denied its defense under the same law.

There can be but one satisfaction for an injury, and if the defendant was liable the Burlington company was also liable and a joint tort feasor with it. The Burlington company had been running over this track in its existing condition for many years, had obtained the right to use, and had used, it in making deliveries to other railroads, and almost every month for at least five years had received a bill rendered by the defendant for the use of it. The Burlington company was chargeable with notice of the existing conditions, and if there was a cause of action against the defendant there was a cause of action for the same injury against the Burlington Company. One was owner and the other licensee, and neither one erected, maintained or controlled the semaphore. One was as much liable for an injury from its location as the other, so that a satisfaction as to one would have the same effect as to both. City of Chicago v. Babcock, 143 Ill. 358; West Chicago Street Railroad Co. v. Piper, 165 id. 325; Wallner v. Chicago Traction Co. 245 id. 148.

It is admitted by counsel, and was confessed by the remitti-ur in the Appellate Court, that the sums paid to and accepted by the plaintiff were to inure to the benefit of the defendant as a joint tort feasor with the Burlington company, and the defendant, to show a release of the cause of action, proved the following facts: The plaintiff was, and since 1902 had been, a member of the relief department of the Burlington company, and employees of that company made monthly contributions to the relief fund. The company
906 maintained the department and bore the operating expenses, and during the years 1908, 1909 and 1910 contributed to the fund, without reimbursement, $244,000. The plaintiff had received from the relief fund, on account of his injury, $1,231. for benefits

and $1,349.50 paid for hospital bills, physicians' services, and the like, and was still receiving similar benefits from the fund and would continue to receive them while disabled.

It is the law of this State that a voluntary acceptance by a railroad employee, after receiving an injury, of the benefits provided for in his contract of membership in the relief department of his employer, with knowledge that the contract provides such acceptance shall operate as a satisfaction of further claims against the employer on account of such injury, operates as a satisfaction and a bar to a subsequent suit for damages. This was decided in Eckman v. Chicago, Burlington, and Quincy Railroad Co. 169 Ill. 312, following the general current of authorities in other States on the same subject. It was there held that such a contract by which an employee receives at once and without dispute or question a sum of money, perhaps less than he might prove in an action against the employer at the end of litigation, with the attending delays and expenses, and perhaps a division with attorneys, is not contrary to the public policy of the State. The facts proved by the defendant were sufficient to establish, under the law of this State, a satisfaction by the Burlington company of the plaintiff's injury and damages, and the evidence admitted in rebuttal was for the purpose of destroying that defense by means of the Federal Employers' Liability act, which gave no cause of action to the plaintiff and under which the suit was not and could not have been brought. Congress has supreme control over the subject of commerce between the several States, and no one disputes the proposition that whenever suit is brought and facts are averred which constitute a cause of action under an act of Congress relating to that subject, the act supersedes all legislation over the same subject by the States, but Congress cannot, and has not attempted to, determine what shall be the policy of a State or what its laws shall be. There is no act of Congress which would give any right of action in favor of the plaintiff against the defendant, whether engaged in inter-State commerce or not. Congress has not legislated on that subject at all. In an action brought under the State law the defendant is as much entitled to the benefit of the law as the plaintiff. If the law of this State was good for the purpose of recovery it was equally good to establish a defense against the cause of action existing under the same law. To say that a law regulating the rights and duties of parties and giving a right of action for a violation of such rights and duties, and declaring what shall be a release of such right of action, is available for sustaining the action and not available for a defense is to destroy that equality of right which the law is intended to and must preserve. While the Federal statute supersedes the law of the State as to employer and employee when engaged in inter-State commerce, it only supersedes such law where allegations constituting a cause of action under it are made and proved. In the case of Mondou v. New York, New Haven and Hartford Railroad Co. 223 U. S. 1, the opinion was delivered in four cases and the right of action in each was based solely on the act of Congress. The case of Michigan Central Railroad Co. v. Vree-

land, 227 U. S. 59, presented exactly the same condition. The proviso to section 5 of the Federal statute allowing the employer
907 to set off any sum it has contributed to a relief benefit or indemnity fund is expressly limited to actions brought under or by virtue of the provisions of the act, and neither that proviso nor anything contained in the act relates in any way to an action brought under a State law. If the plaintiff had sued his employer, the Burlington company, and alleged that the injury occurred while the engines and cars were engaged in inter-State commerce, the Federal statute would apply and the employer could only set off against the damages the sum contributed to the relief fund, but if the plaintiff had brought this suit against the Burlington company the evidence of membership in the relief department and the receipt of benefits would have established a satisfaction for the injury and have been a complete defense. We do not agree with the majority that a plaintiff may bring an action under the law of one jurisdiction and prevent a valid defense under that law by invoking the law of another and different jurisdiction. The cause of action having been released, we think the judgment of the Appellate Court should be reversed and the cause remanded to the Superior Court.

908 EXHIBIT 2.

In the Supreme Court of Illinois, October Term, A. D. 1914.

No. 9198.

JOSEPH M. WAGNER, Defendant in Error,
vs.
CHICAGO & ALTON RAILROAD COMPANY, Plaintiff in Error.

Error to the Appellate Court of Illinois, First District, and Superior Court of Cook County.

Petition by Plaintiff in Error for a Rehearing.

Winston, Payne, Strawn & Shaw, Attorneys for Plaintiff in Error.
Silas H. Strawn, Edward W. Everett, J. Sidney Condit, of Counsel.

908*a* In the Supreme Court of Illinois, October Term, A. D. 1914.

JOSEPH M. WAGNER, Defendant in Error,
vs.
CHICAGO & ALTON RAILROAD COMPANY, Plaintiff in Error.

Error to the Appellate Court of Illinois, First District, and Superior Court of Cook County.

Petition by Plaintiff in Error for a Rehearing.

To the Honorable Judges of the Supreme Court of the State of Illinois:

The plaintiff in error respectfully asks this Honorable Court to grant a rehearing in the above entitled cause and withdraw the affirming opinion filed and set aside the judgment of affirmance.

1. We believe the court has overlooked and misapprehended the application of the Federal Employers' Liability Act to the case at bar. That act is a new one and at the time of filing the briefs there were few precedents to aid in determining whether the act should or should not apply. The question involves a Federal law, and the decisions of the Federal Courts should control. Since this case came before this court there have been several decisions which may assist in the determination of this point.

We contend the court has misapprehended the application of Section five of the Federal Act, because:

(*a*) The act only applies in cases where the relation of master and servant exist and both are engaged in interstate commerce;

(*b*) Section 5 provides that a common carrier cannot exempt "itself from any liability created by this act." The declaration did not allege a liability that was created by this Federal Act;

(*c*) Section 5 does not nullify the release. It merely declares the contract by which the common carrier exempts itself from liability under the act "void to that extent." To that extent as used means the "liability created by the act."

(*d*) Unless there is a liability created by the act, Section 5 does not apply, because it is only that liability that cannot be released by "contract or device," such as a relief benefit organization contract. It must be determined then whether there is a "liability created by this act." The first essential is, that the action be brought by a servant against a master both being engaged in interstate commerce. That relation alone, does not create a liability. The act provides that a suit may be maintained under that act for
908*b* negligence by a carrier or its employes "by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves and other equipment. (Our brief, p. 149.)

(*e*) This court, therefore, must necessarily determine, first whether there is "a liability under the act." If the Burlington is not responsible, for a liability created by the act, then Section 5 has no application. This action is not against the Burlington under the act. Therefore, defendant in error must have released the common law liability of the Burlington. No liability existed under the act on the part of the Burlington, because the doctrine of assumed risk applied. It may be that defendant in error and his counsel decided that the Burlington was not liable under the Federal Act and was not liable under the common law, and therefore determined to accept the benefits under the contract with the relief department. The Burlington made no defense in the case at bar. This court is unable to determine that there was a liability created by the act against the Burlington, because the Burlington offered no defense. It is unfair to assume that the plaintiff in error, which did not have the benefit of the doctrine of assumed risk as a defense, presented the same defense that the Burlington would have presented, because it could have defended on the ground that its employe, the defendant in error, assumed the risk.

(*f*) The law does not permit defendant in error to begin a suit

based on common law in a jurisdiction where the common law is in force and then deny the plaintiff in error the defenses given to it by the same law in the same jurisdiction.

(*g*) Before this court can apply Section 5 to this case it must find that Congress legislated in a certain field. It is the law that where Congress legislates in a field, its laws supersede State laws. This presents the question of what field did Congress legislate in when it passed the Federal Employers' Liability Act. It regulated or modified the liability of a common carrier for injuries to its employes while both were engaed in interstate commerce. Then a liability may be created, not because the relation of master and servant engaged in interstate commerce exists, but because of negligence in the specific nature stated in that act.

(*h*) In passing Section 5 of the act, Congress did not attempt to nullify all releases given by employes to employers engaged in interstate commerce. It nullified only such contracts or devices by which releases were given where the liability was created by the act. Obviously, it applies only to employes who bring suits against their employers, both being engaged in interstate commerce, to establish a liability created by the Federal Act. This is the clear intent of Section 5, because it nullifies the release given by relief organization contracts only to the extent that they release the liability created by the act.

Reading the entire act convinces one that it was the intent of Congress by passing this act to legislate only in the field of plaintiff employes, and defendant employers engaged in inter-
908c state commerce. Section 1 states that any carrier engaged in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce. Section 2 has the same provisions, but applying to other possessions of the United States. Section 3 refers directly to actions brought under this act and the defense of contributory negligence is not a bar to recovery, but permits that defense for the purpose of diminishing damages in proportion to the negligence attributable to the employe. Clearly it has no reference to others than employes and employers and plaintiffs and defendants in cases brought under the act. Section 4 again refers to any action brought by a plaintiff employe against a defendant employer and merely modified the doctrine of assumed risk.

(*i*) Reading Section 5 in connection with the previous sections, it is quite clear that it was the intention of Congress to nullify only releases given by plaintiffs to defendants who are under the act (Reply brief, p. 25.)

I.

In Robinson v. Baltimore & Ohio R. R. Co., 40 Appeal Cases, District of Columbia, page 169, the decision of the Court of Appeals of the District of Columbia, reviews the judgment of the Supreme Court of the District of Columbia. Robinson was a porter in charge of a car belonging to the Pullman Company running in a train on the Baltimore & Ohio Railroad in interstate commerce. When he

entered the employment of the Pullman Company he agreed, by contract, to assume the risks of accidents or casualties and released and discharged the Pullman Company from liability. The first question for determination was, whether at the time of the injury Robinson was an employe of the railroad company and thereby entitled to maintain his action under the Federal Act. The second question was whether the release contract with the Pullman Company constituted a bar against the railroad company. After reciting the act, the court states (p. 174):

"While it is in derogation of the common law, it should be construed so as to give effect to the evident intent of Congress. * * * It applies broadly to any employe of a railroad company injured while engaged in interstate commerce. Of course, if plaintiff was in the employ of defendant at the time of the accident, he would be entitled to maintain his action under Section 5 of the Act of 1908, irrespective of the contract of employment. Hence, the case turns solely upon the nature of plaintiff's employment."

The court expressly finds that Robinson was not an employe of the railroad company. It then discusses the application of Section 5, and its effect upon the release given by Robinson to the Pullman Company, for injuries he received while at work. The court states (p. 179):

"* * * This provision must be construed in relation to the act, which relates alone to railroad employes engaged in interstate commerce. Plaintiff, not occupying that relation to defendant, cannot avail himself of it to defeat his contract of employment."

908*d* In Fort Worth Belt Railway Company v. Perryman, 158 S. W., 1181, Perryman instituted suit against the Railway Company and Swift & Company to recover damages for personal injuries received by him while engaged in making certain repairs to the passageway or vestibule of a doorway in one of the buildings owned and occupied by Swift & Company, whose employe he was. He received his injuries through the negligence of the defendants in causing a string of cars to be moved while he was thus engaged at his work. He recovered a judgment against both defendants. An exception was taken by the appellant, Railway Company, to the court's ruling in refusing to permit it to show that appellee at the time of the injury was engaged in interstate commerce. In holding the trial court's ruling correct, the court says (p. 1183):

"The ruling was right, however, since the Federal Employers' Liability Act could have no application whatever to this case in so far as it affects appellant, because appellee was in no sense an employe of this appellant; the act applying only to cases of injuries to or the death of employes of railroads. Federal Statutes Anno. Supplement 1909, p. 584. (U. S. Comp. St. Supp. 1911, p. 1322.)"

In Missouri, K. & T. Ry. Co. v. West, 134 Pac., 655, an express messenger was injured and sued for damages. The railroad company claimed the benefit of the Federal Act, in order to avoid State statutes. The court held he was not an employe of the railroad company and therefore the Federal Act did not apply.

In Missouri, K. & T. Ry. Co. of Texas v. Blalack, 147 S. W., 559, an express agent was injured while on a train engaged in interstate commerce. He sued the railroad company under the State laws. The railroad company attempted to invoke the Federal Act as a defense. The court states (559):

"The defendant was required to prove that deceased was its employe in order to avail itself of the Federal law; and, having failed, the State law governed. * * * The failure to show Blalack to have been a servant of defendant renders all argument and authority on that subject superfluous."

In Wabash R. R. v. Hayes, 234 U. S., 86, counsel for defendant in error here, appeared as counsel for Hayes on appeal from the Appellate Court of Illinois, First District. It was an action to recover damages for personal injury, by a switchman against a railroad. The suit was brought upon the theory that the Federal Act applied. Plaintiff failed to show that the injury occurred in interstate commerce. The recovery was sustained under the State law. The court said (p. 89):

"Whether that ruling operated as a denial of a right or immunity to which the defendant was entitled under the Federal Act is the question, and the only question, sought to be presented by the assignments of error.

Had the injury occur-ed in interstate commerce, as was alleged, the Federal Act undoubtedly would have been controlling and a recovery could not have been had under the common or statute law of the State; in other words, the Federal Act would have been exclusive in its operation, not merely cumulative. (Citing cases.) On the other hand, if the injury occurred outside of interstate commerce, the Federal Act was without application and the law of the
908e State was controlling. * * * That the injury did occur outside of interstate commerce was declared in the court's instruction to the jury, and the defendant, having requested the instruction, is bound by it. It therefore must be taken as settled that the right of recovery arose under the State law."

From the cases cited it is essential, before the Federal Act can be applied, that the relation of employer and employe exist, also that they were engaged in interstate commerce at the time of the injury. In the case at bar, defendant in error was not the employe of the plaintiff in error.

The statement in the dissenting opinion herein, "We do not agree with the majority that a plaintiff may bring an action under the law of one jurisdiction and prevent a valid defense under that law by invoking the law under a different jurisdiction," is supported by the following authorities:

C., R. I. & P. Ry. Co. v. C. B. Thompson, 100 Texas, 185; 97 S. W., 459; 7 L. R. A. (N. S.), 191.

McDermon v. Southern Pacific Co., 122 Fed., 669.

B. & O. S. W. Ry. Co. v. Read, 62 N. E., 488.

Knowlton v. Erie Ry. Co., 19 Ohio Sta., 260; 2 Am. Rep., 395.

Mexican Central Ry. Co. v. Gehr, 66 Ill. App., 173.

Minor on Conflict of Laws, Sec. 197, p. 485.

In 38 Cyc., 549, it is said:

"As the existence of a transitory cause of action is primarily determined by the lex loci, it follows that the same law must in general govern the defenses which may prevent recovery."

In 22 Am. & Eng. Ency. of Law, p. 1380, the law is stated as follows:

"Whatever would be a defense to an action of tort if it had been brought in the State where the tort was committed is a defense in the State of the forum even though it would be otherwise if the cause of action had arisen in that State, provided it is not against the policy of the law of the forum."

If it is necessary to determine whether or not there is a liability created by the act against the Burlington, the court ought to consider the late decisions of the United States Supreme Court interpreting the act.

Assumed risk is available as a defense under the act, except where a Federal statute enacted for the safety of employes has been violated.

Seaboard Air Line Ry. v. Horton, 233 U. S., 492.
Central Vermont Ry. Co. v. Bethune, 206 Fed., 868.
Southern R. R. v. Crockett, decided by the U. S. Supreme Court June 22, 1914.

Applying the doctrine of assumed risk as a defense for the Burlington, if an action were begun under the act against it, the court would find the Burlington was not liable.

Choctaw, O. & G. R. R. Co. v. McDade, 191 U. S., 64.
Southern Pac. Co. v. Seley, 152 U. S., 145.
Northern Pac. R. R. Co. v. Hambly, 154 U. S., 349.
Randall v. B. & O. R. R. Co., 109 U. S., 478.

908*f* II.

The court has overlooked and misapprehended the force of the agreement made by the attorneys for the parties before the trial started. (Reply brief, 21; Abst., 75 and 173.) The opinion in this case finds that such an agreement was made. The attorney making the agreement knew at the time, that the plaintiff in error relied upon the release given the Burlington as a bar to the action. (Reply brief, 22.) The agreement that the interstate commerce feature was not in the case held good until after plaintiff in error had closed its case. The trial court permitted counsel to break the agreement when he offered evidence in rebuttal, over the objection of plaintiff in error, to show that the Burlington cars were engaged in interstate commerce. It may be that the plaintiff in error could have produced evidence if necessary to prove that there was no liability under the act on the part of the Burlington in order to obtain the benefit of the release given and defeat the application of the act.

Plaintiff in error had closed its case, relying on the agreement that the Federal Act was out of the case.

The application of the act depended on the responsibility of the

Burlington for a "liability created by the Act." That issue was never tried. (Our brief, p. 87.)

III.

The court has overlooked the facts and has misapprehended the law of this State, which prohibits one from receiving double compensation for injuries. (Our original brief, p-. 22 and 72.) By defendant in error's contract with the Burlington relief organization, he has been paid a large sum and will continue to receive payments during his disability. At the same time, if this decision stands, he will receive full compensation from plaintiff in error for the same injuries.

IV.

We believe the court has overlooked the evidence establishing clearly that the defendant in error was guilty of negligence, as a matter of law, which precludes his recovery. (Our brief, p. 25.)

V.

We believe the court has overlooked the vicious and inflammatory remarks made by counsel that prejudiced the jury. (Our brief, pp. 106 to 116.)

VI.

We believe the court has overlooked the force of our argument in support of our contention that it was reversible error to give instruction No. 9 and that such error was not cured by the remittitur. (Our brief, p. 89.)

908*g* We respectfully submit for the consideration of this Honorable Court that for the reasons herein stated, a rehearing ought to be allowed and a full opportunity given plaintiff in error to further argue and submit late Federal authorities upon the different points raised.

The scope and application of the Federal Act has been determined in many cases by the Federal Courts since this appeal was perfected. We believer on a rehearing, we can convince the court that it has misapprehended the law in that respect.

Respectfully submitted,

WINSTON, PAYNE, STRAWN & SHAW,
Attorneys for Plaintiff in Error.

SILAS H. STRAWN,
EDWARD W. EVERETT,
J. SIDNEY CONDIT,
Of Counsel.

909 In the Supreme Court of the United States and in the Supreme Court of the State of Illinois.

No. 9198.

JOSEPH M. WAGNER, Defendant in Error (Now Defendant in Error),
vs.
CHICAGO AND ALTON RAILROAD COMPANY, Plaintiff in Error (Now Plaintiff in Error).

Order Allowing Writ of Error.

Let the Writ of Error issue upon the execution of a bond by The Chicago and Alton Railroad Company to Joseph M. Wagner in the sum of Twenty Thousand Dollars ($20,000.00); such bond when approved to act as a supersedeas.

Dated at Oregon, in the State of Illinois, this 30th day of January, A. D. 1915.

JAMES H. CARTWRIGHT,
Chief Justice of the Supreme Court of the State of Illinois.

910 [Endorsed:] No. 9198. In the Supreme Court of the United States and in the Supreme Court of the State of Illinois. Joseph M. Wagner, Defendant in Error (Now Defendant in Error), vs. Chicago and Alton Railroad Company, Plaintiff in Error (Now Plaintiff in Error). Original. Petition for Writ of Error. With order of allowance by Chief Justice James C. Cartwright. Winston, Payne, Strawn & Shaw, Attorneys at Law, First National Bank Building, Chicago.

911 Filed Jan. 30, 1915. Chas. W. Vail, Clerk of Supreme Court.

In the Supreme Court of the United States and in the Supreme Court of the State of Illinois.

No. 9198.

JOSEPH M. WAGNER, Defendant in Error (Now Defendant in Error),
vs.
CHICAGO AND ALTON RAILROAD COMPANY, Plaintiff in Error (Now Plaintiff in Error).

Assignment of Errors in the Supreme Court of the United States and Prayer for Reversal.

And now comes the Plaintiff in error in said cause and in connection with its petition for a writ of error out of the Supreme Court

of the United States, says that in the record and proceedings in said cause in the Supreme Court of Illinois there is manifest error and makes the following assignment of said errors which occurred in the hearing and decision of said cause in the Supreme Court of Illinois, that is to say:

I.

The Supreme Court of Illinois erred in affirming the judgments of the Appellate Court and the Superior Court of Cook County.

II.

The Supreme Court of Illinois erred in refusing to reverse the judgments of the Appellate Court and the said Superior Court for the errors committed by said courts and specifically assigned in said Supreme Court of the State of Illinois.

III.

The decision of the said Supreme Court of Illinois is against the title, right, privilege or immunity specially set up and claimed by plaintiff in error under a statute of the United States.

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IV.

The Supreme Court of Illinois erred in its construction and application of a section of a statute of the United States, that is to say: Section 5 of an Act of April 22, 1908, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases," (35 Stat. 65 Ch. 149) hereinafter referred to as "The Federal Employers' Liability Law," and erred in denying to plaintiff in error a right, title, privilege or immunity specially set up or claimed under said section, to the great damage of plaintiff in error.

V.

The Supreme Court of Illinois erred in affirming the judgments of the Appellate Court and the Superior Court of Cook County, invalidating a release valid at the common law, by the erroneous construction and application of Section Five (5) of "The Federal Employers' Liability Law," and erred in denying to plaintiff in error a right, title, privilege or immunity specially set up or claimed under said section, to the great damage of plaintiff in error.

VI.

The Supreme Court of Illinois erred in denying the claim of plaintiff in Error that Section 5 of "The Federal Employers' Liability Law" was in no way applicable to an action brought under a state law, and erred in denying to plaintiff in error such right, title, privilege or immunity specially set up and claimed under said section, to the great damage of plaintiff in error.

VII.

The Supreme Court of Illinois erred in denying the claim of plaintiff in Error that Section Five (5) of "The Federal Employers' Liability Law" should be so construed as not to permit any person, to claim the invalidity of any contract, rule, regulation or device mentioned therein, unless such person contested their validity in an action brought under said act, and erred in denying
913 to plaintiff in error such right, title, privilege or immunity specially set up or claimed under said section, to the great damage of plaintiff in error.

VIII.

The Supreme Court of Illinois erred in denying the claim of plaintiff in Error that Section Five (5) of "The Federal Employers' Liability Law" should be so construed as not to invalidate any contract, rule, regulation or device, the purpose or intent of which was to enable any common carrier to exempt itself from any liability created by that act unless the validity of such contract, rule, regulation or device was claimed by the employer liable under said act, and erred in denying to plaintiff in error such right, title, privilege or immunity specially set up or claimed under said section, to the great damage of plaintiff in error.

IX.

The Supreme Court of Illinois erred in denying the claim of plaintiff in Error that Section Five (5) of "The Federal Employers' Liability Law" should be so construed as to not invalidate any contract, rule, regulation or device mentioned therein, unless the invalidity of such contract, rule, regulation or device was contended for by an employee in an action brought by him against his employer to establish a liability created by said law, and erred in denying to plaintiff in error such right, title, privilege or immunity specially set up or claimed under said section, to the great damage of plaintiff in error.

X.

The Supreme Court of Illinois erred in denying the claim of plaintiff in error that Section Five (5) of "The Federal Employers' Liability Law" should be so construed as only to invalidate any contract, rule, regulation or device mentioned therein in so far as they operated as a release of a liability created by the act
914 and not to invalidate them in so far as the acceptance of benefits thereunder operated as a release of a liability not created by the act of a person other than the maker's employer, and erred in denying to plaintiff in error such right, title, privilege or immunity specially set up or claimed under said section, to the great damage of plaintiff in error.

XI.

The Supreme Court of Illinois erred in denying the claim of plaintiff in Error that Section Five (5) of "The Federal Employers' Liability Law" should be so construed as not to invalidate a contract, rule, regulation or device, the purpose or intent of which was to enable any common carrier to exempt itself from any liability created by that act, or as to prevent the acceptance of relief benefits under said contract, etc., from operating as a release at common law, when such acceptance and consequent release is relied upon by one who was a joint tortfeasor with the employer as a release of his own liability outside of said Federal act, and erred in denying to plaintiff in error such right, title, privilege or immunity specially set up or claimed under said section, to the great damage of plaintiff in error.

XII.

The Supreme Court of Illinois erred in denying the claim of plaintiff in Error that Section Five (5) of "The Federal Employers' Liability Law" should be so construed as to permit it to defend successfully said cause by proving (1) the contract of defendant in Error with the Relief Department of the Burlington Railroad Company, (2) the provision therein that the voluntary acceptance by defendant in Error of benefits therefrom after having received an injury should operate as a satisfaction of further claims against said company on account of such injury, (3) the acceptance by defendant in Error of such benefits after having received an injury, (4) his release thereby of the Burlington Railroad Company, and consequently (5) under the common law, his release of any liability on the part of the plaintiff in Error, a joint tortfeasor with
915 said Burlington Railroad Company, although had the said Burlington Railroad Company been sued by defendant in Error under the provisions of said act on a liability created thereby, it could not have successfully made such defense, and erred in denying to plaintiff in Error such right, title, privilege or immunity specially set up or claimed under said section, to the great damage of plaintiff in Error.

XIII.

The Supreme Court of Illinois erred in denying the claim of the plaintiff in Error that Section Five (5) of "The Federal Employers' Liability Law" did not supersede the common law of the State of Illinois applicable in an action not brought under the act, and erred in denying to plaintiff in Error a right, title, privilege or immunity specially set up or claimed under said section, to the great damage of plaintiff in Error.

XIV.

The Supreme Court of Illinois erred in denying the claim of plaintiff in Error that Section Five (5) of "The Federal Employers' Liability Law" was not legislation by Congress in the field of actions

against railroads brought by persons other than their employees, and erred in denying to plaintiff in Error a right, title, privilege or immunity specially set up or claimed under said section, to the great damage of plaintiff in Error.

XV.

The Supreme Court of Illinois erred in denying the claim of plaintiff in Error that Section Five (5) of "The Federal Employers' Liability Law" did not determine the public policy of the State of Illinois in actions brought against railroad companies by persons not employed by such companies, which said claim as to the effect of said section was specially set up and claimed by plaintiff in Error, and erred in denying to plaintiff in Error a right, title, privilege or immunity specially set up or claimed under said section, to the great damage of plaintiff in Error.

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XVI.

The Supreme Court of Illinois erred in refusing to reverse the judgments of the Appellate Court and the Superior Court of Cook County because of the error committed by the trial court in admitting in rebuttal, evidence to prove that at the time defendant in error was injured the Chicago, Burlington & Quincy Railroad Company and he were engaged in interstate commerce.

XVII.

The Supreme Court of Illinois erred in refusing to reverse the judgments of the Appellate Court and the Superior Court because of the error committed by the trial court in erroneously giving to the jury the following instruction at the request of defendant in error:

9. "If, under the evidence and instructions of the court, the jury find defendant guilty, and that plaintiff is entitled to damages, then, in the assessment of such damages, you should not credit the defendant with any sum which the Chicago, Burlington & Quincy Railroad Relief Department paid to the plaintiff, or paid to any doctor, or other person, for or on account of the plaintiff."

(Given.)

XVIII.

The Supreme Court of Illinois erred in refusing to reverse the judgments of the Appellate Court and the Superior Court because of the errors committed by the trial court in erroneously refusing to give to the jury the following instructions which plaintiff in error submitted and requested be given the jury:

29. "You are further instructed that if you find from the evidence in this case that the plaintiff accepted a sum of money as damages for injuries that he sustained at the time and place charged in the declaration, from the Chicago, Burlington & Quincy Railroad Company, and that in consideration of the payment of said

money for such damages the plaintiff accepted said money in full payment and release of all claims that he had or might have
917 against the said Chicago, Burlington & Quincy Railroad Company for damages for said injuries, then you are instructed that as a matter of law, receiving said payment in full satisfaction and release of his claims that he had or might have against the said Chicago, Burlington & Quincy Railroad Company is a bar to his action against the defendant, the Chicago and Alton Railroad Company, and if you find that he accepted a payment of money from the Chicago, Burlington & Quincy Railroad Company as aforesaid and released them as aforesaid, then you are instructed the acceptance of such payment is a bar to this action, and under such state of proof you must find the defendant not guilty."
(Refused.)

30. "You are further instructed as a matter of law, that where a person is injured and more than one person or corporation is jointly or severally liable to such person for damages for his injuries, and one of said persons or corporations pays to the injured person a sum of money in full satisfaction and release of his damages for said injuries, then you are instructed that such injured person can not recover damages for the same injury; in other words, where the plaintiff in the case has received payment in full from one of the joint — feasors and released the one paying the money from all liability for such injury in full settlement of his damages for such injury, he is barred from recovering damages against any other person or company liable for the same injury."
(Refused.)

31. "The Court instructs the jury that where an injury is caused by the acts of two or more persons, such persons causing such injury are in law called joint tort feasors. The court also instructs the jury that if the person receiving such injuries accepts in payment of his injuries anything of value from one of said so-called tort feasors, such acceptance on his part is a release of all liability on the part of the other of the so-called tort feasors."
(Refused.)

918

XIX.

The Supreme Court of Illinois erred in entering judgment contrary to the evidence in the record of said cause.

XX.

The Supreme Court of Illinois erred in failing and refusing to hold that the judgment of the trial court is contrary to the evidence in the record in said cause.

XXI.

The Supreme Court of Illinois erred in failing and refusing to hold that the trial court committed error in denying the motion of

the defendant in said court, made at the close of all the evidence, to instruct the jury to return a verdict finding the defendant not guilty, and in refusing to give to the jury the instruction in writing tendered by the defendant to the court with said motion, instructing the jury to find the defendant not guilty.

XXII.

The Supreme Court of Illinois erred in failing and refusing to hold that the trial court committed error in giving to the jury each and every instruction requested by the plaintiff in said trial court and marked "Given" by the court.

XXIII.

The Supreme Court of Illinois erred in failing and refusing to hold that the trial court committed error in refusing to give to the jury each and every instruction requested by the defendant in said trial court and marked "Refused" by the Court.

XXIV.

The Supreme Court of Illinois erred in failing and refusing to hold that the trial court committed error in permitting the attorney for the plaintiff in said court, over the objections and exceptions of the defendant therein, to make remarks and arguments to and in the presence of the jury prejudicial to the defendant therein.

919 XXV.

The Supreme Court of Illinois erred in failing and refusing to hold that the verdict of the jury in the trial court is the result of passion and prejudice on the part of the jury.

XXVI.

The Supreme Court of Illinois erred in failing and refusing to hold that the trial court committed error in denying the motion of the defendant made therein for a new trial of said cause, for the reasons and each of them set forth by the defendant in said motion for a new trial.

XXVII.

The Supreme Court of Illinois erred in failing and refusing to hold that the trial court committed error in refusing to arrest the judgment upon the verdict of the jury.

XXVIII.

The Supreme Court of Illinois erred in that the judgment aforesaid given was for the said Joseph M. Wagner and against the said The Chicago and Alton Railroad Company; whereas by the law of

the land the said judgment ought to have been given for the said The Chicago and Alton Railroad Company and against the said Joseph M. Wagner.

Wherefore, the plaintiff in error prays that the judgment of the Supreme Court of Illinois, affirming the judgment of the Appellate Court of the First District of Illinois, which, after requiring a remittitur, affirmed a judgment of the Superior Court of Cook County in the State of Illinois, may be reversed, annulled and in all things set aside, and that the plaintiff in error may be restored to all things which it has lost by the occasion of the said judgment.

SILAS H. STRAWN,
EDWARD W. EVERETT,
J. SIDNEY CONDIT,
Attorneys for Plaintiff in Error.

920 [Endorsed:] No. 9198. In the Supreme Court of the United States and in the Supreme Court of the State of Illinois. Joseph M. Wagner, Defendant in Error (Now Defendant in Error) vs. Chicago and Alton Railroad Company, Plaintiff in Error (Now Plaintiff in Error). Original. Assignment of Errors and Prayer for Reversal. Winston, Payne, Strawn & Shaw, Attorneys at Law, First National Bank Building, Chicago.

921 Be It Remembered that on the 30th day of January, A. D. 1915, there was duly filed in the office of the Clerk of the Supreme Court of Illinois by the Chicago & Alton Railroad Company, plaintiff in error, an original bond for writ of error from the Supreme Court of the United States to the Supreme Court of Illinois, in words and figures as follows, to-wit:

922 *Bond.*

Know all men by these presents, That we, The Chicago and Alton Railroad Company, as Principal, and The Ætna Accident and Liability Company, as Surety, are held and firmly bound unto Joseph M. Wagner in the sum of Twenty Thousand Dollars ($20,000.00) to be paid to the said Joseph M. Wagner, to which payment well and truly to be made we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of January, A. D. 1915.

Whereas, the above named plaintiff in error, The Chicago and Alton Railroad Company, seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Illinois.

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said Writ of Error to effect, and answer all costs and damages that may be adjudged

if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

[CORPORATE SEAL.] THE CHICAGO AND ALTON RAILROAD COMPANY,
By W. G. BIERD, *President.*
THE ÆTNA ACCIDENT AND LIABILITY COMPANY,
By J. M. TIRAMONS,
Resident Vice President.
W. W. DRAHEIM,
Resident Ass't Secretary.

Attest:
H. E. R. WOOD,
Ass't Secretary.

Bond Approved and to Operate as a Supersedeas.
JAMES H. CARTWRIGHT,
Chief Justice of the Supreme Court of the State of Illinois.

Dated January 30th 1915.

Bond agreed to be satisfactory.
JAS. C. McSHANE,
Attorney for Defendant in Error.

Revenue Stamp.

Filed Jan. 30, 1915. Chas. W. Vail, Clerk of Supreme Court.

923 [Endorsed:] No. 9198. In the Supreme Court of the United States and in the Supreme Court of the State of Illinois. Joseph M. Wagner, Defendant in Error (Now Defendant in Error), vs. Chicago and Alton Railroad Company, Plaintiff in Error (Now Plaintiff in Error). Copy of Bond. Winston, Payne, Strawn & Shaw, Attorneys at Law, First National Bank Building, Chicago.

924 UNITED STATES OF AMERICA,
State of Illinois,
Office of the Clerk of the Supreme Court of Illinois, ss:

Be it remembered that on the 30th day of January, A. D. 1915, there was duly filed in the office of the Clerk of the Supreme Court of Illinois, an original writ of error, which is hereby attached and is in the words and figures following, to-wit:

925 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or

POOR COPY

some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Joseph M. Wagner, defendant in error, and The Chicago and Alton Railroad Company, plaintiff in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States, together with this writ, ame in the said Supreme Court at Washington, within days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States the 30th day of January, A. D. 1915.

[Seal of the District Court United States, Southern District Illinois.]

R. C. BROWN,
Clerk of the District Court of the United States in and for the Southern District of Illinois.

Approved and allowed by the Honorable James H. Cartwright, Chief Justice of the Supreme Court of the State of Illinois.

JAMES H. CARTWRIGHT,
Chief Justice of the Supreme Court of the State of Illinois.

927 [Endorsed:] No. 9198. In the Supreme Court of the United States and in the Supreme Court of the State of Illinois. Joseph M. Wagner, Defendant in Error (Now Defendant in Error), vs. Chicago and Alton Railroad Company, Plaintiff in Error (Now Plaintiff in Error). Original Writ of Error and Allowance thereof. Filed Jan. 30, 1915. Chas. W. Vail, Clerk of Supreme Court. Winston, Payne, Strawn & Shaw, Attorneys at Law, First National Bank Building, Chicago.

928 In the Supreme Court of the United States and in the Supreme Court of the State of Illinois.

No. 9198.

JOSEPH M. WAGNER, Defendant in Error (Now Defendant in Error),
vs.
CHICAGO AND ALTON RAILROAD COMPANY, Plaintiff in Error (Now Plaintiff in Error).

Certificate of Lodgment.

SUPREME COURT,
State of Illinois, ss:

I, Charles W. Vail, Clerk of said Supreme Court, do hereby certify that there was lodged with me as such Clerk on the 30th day of January, A. D. 1915.

No. 9198.

In the Matter of

JOSEPH M. WAGNER, Defendant in Error,
vs.
THE CHICAGO AND ALTON RAILROAD COMPANY, Plaintiff in Error.

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error as herein set forth, one for defendant in error and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Supreme Court of Illinois at Springfield, this 30th day of January, A. D. 1915.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHARLES W. VAIL,
Clerk of the Supreme Court of Illinois.

Filed Jan. 30, 1915. Chas. W. Vail, Clerk of Supreme Court.

929 *Bond.*

Know all men by these presents, That we, The Chicago and Alton Railroad Company, as Principal, and The Ætna Accident and Liability Company, as Surety, are held and firmly bound unto Joseph M. Wagner in the sum of Twenty Thousand Dollars ($20,000.00) to be paid to the said Joseph M. Wagner, to which payment well and truly to be made we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of January, A. D. 1915.

Whereas, the above named plaintiff in error, The Chicago and Alton Railroad Company, seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Illinois.

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of Error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

[CORPORATE SEAL.] THE CHICAGO AND ALTON RAILROAD COMPANY,
By W. G. BIERD, *President.*
THE ÆTNA ACCIDENT AND LIABILITY COMPANY,
By J. M. TIRAMONS,
Resident Vice President.
W. W. DRAHEIM,
Resident Ass't Secretary.

Attest:

H. E. R. WOOD, [CORPORATE SEAL.]
Ass't Secretary.

Bond Approved and to Operate as a Supersedeas.

JAMES H. CARTWRIGHT,
Chief Justice of the Supreme Court of the State of Illinois.

Dated January 30th, 1915.

Bond agreed to be satisfactory.

JAS. C. McSHANE,
Attorney for Defendant in Error.

930 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Joseph M. Wagner, defendant in error, and The Chicago and Alton Railroad Company, plaintiff in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an

authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at
931 Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States the 30th day of January, A. D. 1915.

[SEAL.] R. C. BROWN,
Clerk of the District Court of the United States in and for the Southern District of Illinois.

Approved and allowed by the Honorable James H. Cartwright, Chief Justice of the Supreme Court of the State of Illinois.

JAMES H. CARTWRIGHT,
Chief Justice of the Supreme Court of the State of Illinois.

932 Be it also remembered that on the 30th day of January, A. D. 1915, a certain Citation was filed in the office of the Clerk of the Supreme Court in words and figures following, to-wit:

933 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Joseph M. Wagner, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Illinois, wherein The Chicago and Alton Railroad Company is plaintiff in error, and you, Joseph M. Wagner, are defendant in error, to show cause, if any there be, why judgment rendered against said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Illinois this 30th day of January, A. D. 1915.

JAMES H. CARTWRIGHT,
Chief Justice of the Supreme Court of the State of Illinois.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

Attest:
CHARLES W. VAIL,
Clerk of the Supreme Court of the State of Illinois.

CHICAGO, ILLINOIS.

I, the undersigned, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge receipt of due service of the above citation, and enter an appearance in the Supreme Court of the United States.

JAMES C. McSHANE,
Attorney for Defendant in Error, Joseph M. Wagner.

Filed Jan. 30, 1915. Chas. W. Vail, Clerk of Supreme Court.

934 [Endorsed:] No. 9198. In the Supreme Court of the United States and in the Supreme Court of the State of Illinois. Joseph M. Wagner, Defendant in Error (Now Defendant in Error), vs. Chicago and Alton Railroad Company, Plaintiff in Error (Now Plaintiff in Error). Original. Citation. Winston, Payne, Strawn & Shaw, Attorneys at Law, First National Bank Building, Chicago.

935 In the Supreme Court of the United States and in the Supreme Court of the State of Illinois.

No. 9198.

JOSEPH M. WAGNER, Defendant in Error (Now Defendant in Error),
vs.
CHICAGO AND ALTON RAILROAD COMPANY, Plaintiff in Error (Now Plaintiff in Error).

Return to Writ.

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Illinois in the City of Springfield this 20th day of February A. D. 1915.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHAS. W. VAIL,
Clerk Supreme Court of Illinois.

Costs of Suit.

Clerk's costs $31.35, paid by Chicago and Alton Railroad Company.

Costs of transcript $467.50, paid by Chicago and Alton Railroad Company.

CHAS. W. VAIL,
Clerk Supreme Court of Illinois.

Filed Jan. 30, 1915. Chas. W. Vail, Clerk of Supreme Court.

Endorsed on cover: File No. 24,591. Illinois Supreme Court. Term No. 847. The Chicago & Alton Railroad Company, plaintiff in error, vs. Joseph M. Wagner. Filed February 26, 1915. File No. 24,591.

Office Supreme Court, U. S.
FILED
SEP 20 1915
JAMES D. MAHER
CLERK

No. 375

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1915.

THE CHICAGO & ALTON RAILROAD COMPANY,
Plaintiff in Error,

vs.

JOSEPH M. WAGNER,
Defendant in Error.

Writ of Error to the Supreme Court of the State of Illinois.

MOTION TO DISMISS WITH STATEMENT AND ARGUMENT OF DEFENDANT IN ERROR IN SUPPORT THEREOF.

JAMES C. McSHANE,
Attorney for Defendant in Error.

Geo. Hornstein Co., Printer, Chicago.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1915.

No. 375.

The Chicago & Alton Railroad Company,
Plaintiff in Error,

vs.

Joseph M. Wagner,
Defendant in Error.

To Messrs. Winston, Payne, Strawn & Shaw, Attorneys for Plaintiff in Error:

YOU ARE HEREBY NOTIFIED, that on Monday, October 11, 1915, at the opening of court on that date, I shall make and present, before said Supreme Court of the United States, a motion on behalf of defendant in error, to dismiss the writ of error, heretofore sued out from said court, in said cause, on the ground that there is want of jurisdiction in said Supreme Court of the United States, to hear and determine said cause; and that I shall file, in support of said motion, a printed statement and argument, a copy of which is hereto attached.

Dated, Chicago, Illinois, September 17, 1915.

JAMES C. MCSHANE,
Attorney for Defendant in Error.

Received a copy of the foregoing notice, statement and argument, this 17th day of September, A. D. 1915.

WINSTON, PAYNE, STRAWN & SHAW,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1915.

No. 375.

The Chicago & Alton Railroad Company,
Plaintiff in Error,

vs.

Joseph M. Wagner,
Defendant in Error.

MOTION TO DISMISS.

And now comes defendant in error, and shows to the court here that it is without jurisdiction to review this cause, and that the writ of error, herein, was sued out merely for delay, as will more fully appear from the statement and argument in support of this motion, herewith filed.

WHEREFORE, defendant in error prays that the writ of error in this cause be dismissed for want of jurisdiction; and that additional damages be assessed and awarded defendant in error, as for delay, etc.

JAMES C. MCSHANE,
Attorney for Defendant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

THE CHICAGO & ALTON RAILROAD COMPANY,
Plaintiff in Error,

vs.

JOSEPH M. WAGNER,
Defendant in Error.

Writ of Error to the Supreme Court of the State of Illinois.

MOTION TO DISMISS WITH STATEMENT AND ARGUMENT OF DEFENDANT IN ERROR IN SUPPORT THEREOF.

STATEMENT.

Plaintiff in error brought this case to this court by writ of error which was ordered by one of the justices of the Supreme Court of Illinois. The case was brought here for the purpose of securing the reversal of the judgment of the Illinois Supreme Court, affirming the judgment of an Illinois Appellate Court, which affirmed the judgment of the Superior Court of Cook County, in favor of defendant in error, and against plaintiff in error, in a *common law action* on the case, prosecuted to recover damages for personal injuries. Plaintiff in error invokes the jurisdiction of this court upon the ground

that it especially set up or claimed a right, privilege or immunity under the Federal Employers' Liability Act, and that the decision of the State court was against such right, privilege or immunity. We shall herein refer to the parties by their respective titles in the trial, viz.: Wagner as plaintiff and the Railroad Company as defendant. Plaintiff was a conductor or foreman of a switching crew in the employ of the Chicago, Burlington & Quincy Railroad Company (hereinafter referred to as the C. B. & Q.) and he was injured while operating a C. B. & Q. *interstate train* over the tracks of the defendant Chicago & Alton Railroad Company (hereinafter referred to as the C. & A.), and in consequence of the joint or concurrent negligence of the C. & A. and the C. B. & Q. The C. B. & Q. and certain associated railroad companies, *not including the C. & A.*, maintained a relief department known as the Burlington Relief Department, under the terms of which employes who were members of the relief department were entitled to certain stipulated benefits in case of sickness or injury. The terms of the relief department also provided that the *acceptance* by an employe of such benefits should operate as a release and satisfaction to the associated railroad companies. Plaintiff was a member of this relief department prior to and at the time of his injuries, and he accepted the benefits due him from the Relief Department, on account of his injuries. The defendant, the C. & A., although in no manner connected with the Burlington Relief Department, claimed that plaintiff's *acceptance* of such benefits operated as a release and satisfaction to it under the common

law rule, that a release or satisfaction to one tort-feasor, is a release and satisfaction to other joint tort-feasors.

In answer to this contention plaintiff claimed that he and his employer, the C. B. & Q., were engaged in interstate commerce at the time of his injuries, and hence that their rights and obligations in respect to each other, were governed solely by the Federal Employers' Liability Act, and that as Sec. 5 of that act invalidated the releases in question, that therefore there was no *valid* release or satisfaction to the C. B. & Q., and hence there was none to the defendant C. & A. The State court sustained plaintiff's contention in this regard, and this court's jurisdiction is invoked principally upon the ground that this holding of the State courts involved an improper construction and interpretation of Sec. 5 aforesaid. The opinion of the state Supreme Court will be found at Rec., page 587. The case is reported in 265 Ill., 245, and 180 Ill. App., 196.

The following is a more detailed statement of the facts of the case in so far as they relate to the alleged Federal question. The C. B. & Q. was never a party to the suit, upon the contrary, the case was prosecuted *solely* against defendant, the C. & A.

The original declaration contains but one count (Rec., 4), and it alleges in substance that defendant, the C. & A., owned, possessed and operated a certain described railroad, and was a common carrier, etc., engaged upon, by and in connection with said railroad, *and the track hereinafter referred to,* in commerce between the several states; that the C. B. & Q. was possessed of and operated a certain other

described railroad, and was a common carrier, and as such was engaged upon, by and in connection with its said railroad in commerce between the several states, and that plaintiff was then and there employed by the C. B. & Q. in such commerce; that the C. & A. owned, possessed and operated a certain track, which constituted a part of its said railroad, and which track furnished a connection between certain railroads, and upon and over which track the C. B. & Q. and other railroad companies, at the invitation, and with the knowledge and consent of the C. & A., were accustomed to operate engines and cars; that at the time in question the C. B. & Q. at the invitation and with the knowledge and consent of the C. & A. and for a valuable consideration was operating one of its, the C. B. & Q.'s, trains, upon which plaintiff was employed, upon and over said track; that the C. & A., long prior to the time in question, wrongfully and negligently caused and permitted to be placed a certain post alongside of and so close to said track that it was likely and liable to crush switchmen against or knock them from the side or sides of cars while being so operated upon said track and past said post, and that it wrongfully and negligently permitted said post to be and remain in said position from thence to and including the time of plaintiff's injuries, and whereby switchmen employed on trains which were so operated over said track were exposed to great danger of bodily injury; that all of which facts both the C. & A. and C. B. & Q. knew, etc., but that plaintiff did not know, etc., and that the C. & A. and C. B. & Q. also knew, etc., of plaintiff's said lack of knowledge,

but that they and each of them negligently failed to warn him, etc. It further alleges that while plaintiff, in the discharge of his duties, was riding upon the side of one of the cars of said train while it was being operated over said track and past said post, and while he was exercising due care, etc., as a direct result of said dangerous proximity of said post to said track, and of his being uninformed of that fact, he was caught and crushed between the post and car, and was knocked off the car to the ground and thereby then and there sustained the injuries and damages described and complained of.

To this declaration defendant filed the plea of general issue, and also a plea denying ownership or operation of the track or post. (Rec., 7.) It will be observed that the declaration states at least one complete *cause of action at common law,* and that in *addition* it contains allegations that the parties were engaged in interstate commerce sufficient to bring the case within the Federal Employers' Liability Act if that is applicable to such a case.

Afterwards plaintiff filed two additional counts (Rec., 11-14). These counts split up the negligence charged in the original declaration and together contained substantially a restatement of the cause or causes of action contained in the original declaration. The only difference between the original declaration and the additional counts, which is important here, is that while the former contains the allegations that the parties were engaged in interstate commerce, etc., the latter contain no such alle-

gations but are strictly and exclusively common law counts.

To the additional counts defendant filed three pleas, viz., the general issue; a plea denying ownership or operation of the track, post or train; and a plea of the statute of limitations (Rec., 15). To this latter plea plaintiff filed a demurrer (Rec., 16) which is the proper practice in Illinois to raise the question as to whether additional counts do or do not state a new or different cause of action from that stated in an original declaration. (*C. & N. W. Ry. Co.* v. *Gillison*, 173 Ill., 268.)

Plaintiff's right of recovery was submitted to the jury strictly as a common law question. The jury were repeatedly instructed that contributory negligence upon plaintiff's part, if proven, would defeat recovery (see Insts. Nos. 11, 12, 13 (Rec., 559) and 19, 21 (Rec., 560) and 25, 27 (Rec., 562)), which would not be true if the Federal Employers' Liability Act was applicable. The trial, Appellate and Supreme courts all agreed that the evidence warranted the verdict under the common law counts. Had the declaration stated a case solely under the Federal Employers' Liability Act, and had recovery been had on such a declaration, then the question as to whether the evidence warranted the submission of the case to the jury might present a Federal question, and the refusal of the requested instruction to find defendant not guilty might have preserved such Federal question. Such was the case of *St. L. I. M. & S. R. Co.* v. *McWhirter*, 229 U. S., 265. But such was not the case at bar, for there were common law counts in the declaration, and the question of liabil-

ity was submitted to the jury *solely* as a common law question, and hence the question as to whether the evidence was sufficient to warrant the submission of the case to the jury does not involve a Federal question.

As a matter of *defense* to the case made out by plaintiff, defendant proved that the C. B. & Q. and certain associated railroad companies, *not including defendant,* maintained what was known as the Burlington Relief Department, for the benefit of the employes of the associated companies; that plaintiff for years prior to and at the time of his injuries was a member of this relief department; that the contract between the associated railroad companies and their employes who were members of the relief department provided that such employes or their beneficiaries should be paid certain stipulated benefits in case of the employees disability or death due to sickness or injuries, these benefits being due and payable under the contract irrespective of whether the sickness or death of the employee, was or was not, occasioned by the fault or negligence of any of the associated companies, or by anyone else, and irrespective of the question whether such sickness, injury or death occurred while the employees were on or off duty. The evidence showed that the employees themselves contributed 85 per cent of the moneys thus paid in benefits, and that the associated railroad companies contributed but 15 per cent of such moneys. (Rec., 429, 431.) The contract likewise provided that "the *acceptance* by the member of benefits for injury shall operate as a release and satisfaction of all claims against the company and all

other companies associated therewith as aforesaid for damages arising from or growing out of such injury." (Rec., 377.) Defendant also proved that plaintiff was a member of this relief department for many years prior to and at the time of his injuries and that the relief department paid him and he accepted the benefits due him from the relief department, on account of his injuries. Aside from the provisions of Sec. 5 of the Federal Employers' Liability Act this contract under the Illinois decisions would be given full force and effect. (*Eckman* v. *C. B. & Q. R. R. Co.*, 169 Ill., 312.) It was not claimed that plaintiff executed or delivered any other release or satisfaction to the C. B. & Q. or to anyone else, it was his *acceptance* of such benefits alone that was relied upon as a release and satisfaction to the C. B. & Q. and to the defendant. As previously stated, defendant was not in any manner connected with the Burlington Relief Department and it never paid a cent to plaintiff or to the relief department. Defendant's position was and is that plaintiff's *acceptance* of such benefits operated as a release and satisfaction to the C. B. & Q., and that as the C. B. & Q. was its joint tort-feasor, such acceptance of benefits likewise operated as a release and satisfaction to it, the defendant.

Plaintiff urged several answers to defendant's claim in this regard, but the answer that is important here, and which plaintiff proved at the trial was and is, that plaintiff and the C. B. & Q. were engaged upon, by and in connection with the C. B. & Q. Railroad in interstate commerce, and that the cars composing the train which the C. B. & Q. was operat-

ing, and upon which plaintiff was employed at the time of his injuries, were being moved upon an interstate journey, viz., from the Pacific Coast, through the intervening states, to New York (Rec., 498), and hence that plaintiff and the C. B. & Q. were working under, and were subject to the provisions of the Federal Employers' Liability Act, and that as Sec. 5 of that act invalidated the contract of release in question, that there was therefore no valid release and satisfaction to the C. B. & Q., and hence none to the defendant.

As previously stated, the Illinois Supreme Court sustained this view—as did also the Appellate and trial courts—and whether its doing so involved a misconstruction, or misapplication of Section 5, is the principal alleged Federal question upon which defendant relies to give this court jurisdiction of this case.

Defendant's petition for a writ of error, and the assignment of errors filed therewith, indicate that there are two other alleged Federal questions upon which defendant relies in this regard, viz., the giving of one of plaintiff's instructions, and the failure of the State courts to give the effect which defendant claims should have been given to an alleged agreement made by plaintiff's counsel at the trial. We shall state the facts in reference to these latter questions in our argument.

In our argument we shall first endeavor to show that there was no improper construction or misapplication of Section 5, and that there is no Federal question presented in that regard, and that the alleged Federal question here urged was not especial-

ly set up or claimed at the trial. And second, that by the giving of plaintiff's instruction, above referred to, defendant was not denied any right under the statute, which was especially set up or claimed at the trial. And third, that there is no Federal question involved in reference to the agreement of plaintiff's counsel at the trial, and that there was no Federal right especially set up, claimed and denied in that regard.

ARGUMENT.

I.

WE CLAIM, FIRST, THAT THE STATE COURT'S HOLDING THAT PLAINTIFF'S ACCEPTANCE OF BENEFITS FROM THE BURLINGTON RELIEF DEPARTMENT DID NOT OPERATE AS A RELEASE OR SATISFACTION TO DEFENDANT DOES NOT PRESENT A FEDERAL QUESTION; AND SECOND, THAT THE ALLEGED FEDERAL QUESTION IN THIS REGARD WAS NOT ESPECIALLY SET UP OR CLAIMED AT THE TRIAL.

First.

Section 1 of the Federal Employers' Liability Act provides in part:

"That *every* common carrier by railroad, *while engaging in commerce between any of the several states* * * * shall be liable in damages to any person suffering injury *while he is employed by such carrier in such commerce* * * * for such injury or death resulting in whole, or in part, from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (35 Stat. at L., 65, Chap. 149.)

As the plaintiff and the C. B. & Q. were engaged in interstate commerce at the time of plaintiff's injuries it follows that they were subject to, and their rights and obligations in respect to each other were governed *solely* by this act, and hence the C. B. & Q.'s *only liability* to plaintiff on account of its negligence which contributed to his injuries *was created by this act.*

In *Wabash R. R. Co.* v. *Hayes,* 234 U. S., 89, this court said:

"Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling, and a recovery could not have been had under the common or statute law of the state; in other words, *the Federal act would have been exclusive in its operation, not merely cumulative.*"

Section 5 of the act provides:

"That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

In *P. B. & W. R. Co.* v. *Shubert,* 224 U. S., 603, this court held that Section 5 invalidates the particular kind of contract of release involved in this suit. See also to the same effect: *B. & O. R.* v. *Gawinski,* 116 C. C. A., 579; *Barden* v. *A. C. L. R.,*

152 N. C., 318; 67 S. E., 971; *King* v. *A. C. L. R.*, 157 N. C., 44; 72 S. E., 810; *McNamara* v. *W. T. Co.*, 35 App. D. C., 230.

In *Hogarty* v. *Phila. & R. Ry. Co.*, 245 Pa. St., 452, which involved a contract of release like the one in question, the court in speaking of the part of Section 5 in question said that it

"*is the announcement of a broad rule of public policy applicable to all cases within the scope of the statute,* with like effect as though promulgated by one of our acts."

See, also, to the same effect *C. B. & Q. R. R.* v. *McGuire,* 219 U. S., 549, and *P. B. & W. R. Co.* v. *Shubert, supra.*

The Supreme Court of Illinois held in this case that:

"As between defendant in error and the Burlington Company the Federal Employers' Liability Act clearly applied, and if, as the United States Supreme Court has repeatedly held, that law supersedes all state laws on the subject, then the release given by the defendant in error to the Burlington Company was not valid and would not have precluded recovery by him from that company. *If it was not valid so far as the Burlington Company was concerned, it was clearly invalid as to the plaintiff in error and constituted no defense to this action.*"

This proposition that as the contract was void as between plaintiff and the C. B. & Q. it was also void as to the C. & A. seems almost too clear for argument.

In *McMullen* v. *Hoffman,* 174 U. S., 654, this court said:

"The authorities from the earliest time to the present *unanimously* hold that no court will lend

its assistance *in any way* towards carrying out the terms of an illegal contract. In case *any action* is brought in which *it is necessary to prove the illegal contract* in order to maintain the action, courts will not enforce it, *nor will they enforce any alleged rights directly springing from such contract. 'Potior est conditio defendentis.'*"

It is familiar law that "a contract or instrument which is void because it violates an express mandate of the law or the dictates of public policy * * * *has no existence whatever. It has no legal entity for any purpose.*" (6 Ruling Case Law, Sec. 215, p. 819.)

And yet defendant proved, and relies in this case upon the terms of the contract in question which was declared void by statute.

It is not claimed that defendant paid anything to the plaintiff or for his benefits, or that plaintiff executed any release or satisfaction of any kind to the defendant. Defendant's right, if any, to have plaintiff's acceptance of benefits from the Burlington Relief Department treated as a release and satisfaction to it, is necessarily derived *solely* through and from the C. B. & Q., and hence its rights under the contract could in no event be superior to the rights of the C. B. & Q. Therefore, as the contract was void as to the C. B. & Q., it was necessarily void as to the defendant. There is nothing in the wording or purpose of Sec. 5 to support the claim that it invalidates such contracts *only as between employer and employee.* Such contracts, of course, are always between employer and employee, and Sec. 5 proceeds upon that assumption, but Sec. 5, by its express terms, unqualifiedly declares such contracts void to

the extent that they seek to release the carrier from any liability created by the act, and it would require the court to read something into Sec. 5, which is not there, to warrant it in construing the section as invalidating such contracts as to a particular class of persons and leaving them valid as to another class of persons. There is certainly nothing in the evident purpose of the section to warrant such a construction.

Counsel's claim that Sec. 5 invalidates such contracts *only as between employer and employee,* but leaves them valid as to strangers, means that although they are invalid as to the employer, yet they are valid as to those whose negligence joined or concurred with the employer's negligence in causing an employee's injuries. In other words, the claim is that they are void as to the employer, but valid as to his joint tort-feasor, for there are no other imaginable cases in which the question could arise. At any rate, such is the case at bar, and defendant's claim is, that although the contract in question is void as to the C. B. & Q. it is valid as to defendant, the C. B. & Q.'s, joint tort-feasor.

Sec. 5 proceeds upon the assumption that such contracts in the particular mentioned are contrary to public policy and are therefore declared void. It was the evident purpose of Sec. 5 to relieve employes from the unjust and oppressive provision of such contracts, by preventing the employer from escaping the consequence of his negligence. Yet if such contracts are against public policy as to the employer they are clearly so as to the employer's joint tort-feasor, and it is absurd to suppose that Con-

gress intended to invalidate such contracts as to the employer, who had contributed something towards payment of benefits to the injured employee, but intended that they should remain valid as to the employer's joint tort-feasor, who neither paid nor contributed anything, to or for the injured employee.

Counsel's claim that contracts like the one in question should be deemed valid in all cases except in *actions prosecuted under the act,* includes its former claim that they should be deemed valid in all cases except as *between employer and employee,* for no action can be prosecuted under the act, except actions between employer and employee. The statement, therefore, that such contracts must be deemed valid in all cases except in actions prosecuted under the act is but another way of saying that they should be deemed valid except as between employer and employee. There is nothing in the wording or purpose of Sec. 5 to warrant the claim that such contracts should be deemed valid in all cases except in actions prosecuted under the act. The part of Sec. 5 which precedes the proviso, and which is the part that invalidates such contracts, does not mention "action" at all, but unqualifiedly declares such contracts, in the particular mentioned, to be void. The word "action" after the proviso refers merely to the matter of set-off. The clear meaning of the entire section is that such contracts in the particular mentioned are void, but in any action prosecuted under the act the carrier should be credited with the sum contributed by it toward the payment of benefits. If such a contract is held void in an action prosecuted under the act it is not because of

the prosecution of the action, but is so because Sec. 5 declares the contract void. If it was not void before the action was begun it is not rendered void by the prosecution of the action. In such an action the court would merely decide that Sec. 5 invalidated the contract and therefore that it was invalid at the time the action was commenced.

In conclusion we contend that counsel's claim that Sec. 5 should be construed as invalidating such contracts *only* as between employer and employee, and that they should be deemed invalid only in actions prosecuted under the act, is too unsubstantial and frivolous to furnish a basis for invoking the jurisdiction of this court in this case.

In fact, even if counsel's claim in these respects was a substantial claim we think the real question in this regard is as to the interpretation and application of the *common law* rule that a release or satisfaction to one joint tort-feasor is a release and satisfaction to all, and is not as to the construction or application of Sec. 5 of the act in question.

There is and can be no serious question but that the contract was invalid in the respect in question as to the C. B. & Q., and it was therefore a *common law* question, as to whether it was or was not invalid as to defendant. The act in question does not touch the question as to whether such a contract being invalid as between the parties to it should or should not be deemed invalid as to third parties.

Second.

In order to give this court jurisdiction of this case it is, of course, necessary that it should affirmatively

appear of record that defendant in the trial court, "especially set up or claimed" the *particular right* under the Federal statute which, it is claimed, the State court denied. The *particular right* under the statute, which is here urged, is that Sec. 5 should be construed as invalidating contracts like the one in question, *only* in cases prosecuted under the act, by employees against their employers. It, therefore, follows that it is necessary in order to confer jurisdiction upon this court, that it should affirmatively appear of record that defendant claimed and requested this particular construction of Sec. 5 in the trial court.

In *S. A. L. R. Co.* v. *Duvall,* 225 U. S., 477-488, the suit was begun in a State court by an employee, under the Federal Employers' Liability Act, to recover damages from his employer on account of personal injuries, and the suit resulted in a verdict and judgment in favor of the employee, which was affirmed by the Supreme Court of the state, and a writ of error was sued out of this court. Although the employees' right to recover *was expressly based upon the Federal act,* it was held that the case was not reviewable by this court, and the writ of error was dismissed for want of jurisdiction. From the record it appeared that certain instructions asked by the defendant were refused and it was claimed that the refusal of these requested instructions gave the court jurisdiction of the case. But referring to these requested instructions the court said (p. 484):

"Not one of the requests asks *any definite construction* of any part of the employers' liability act, or, indeed, contains *any reference whatever to the act.*"

"* * * * It was the obvious duty of counsel, if they wished *any particular construction* of the act, to put the request *in such definite terms as that the attention of the court might be directed to the point*, and the record here should show that *the right now claimed was the right 'specially set up' and denied* by the court. 'It must appear on the face of the record that *it was in fact raised;* that the judicial mind of the court *was exercised upon it;* and then a decision against the right claimed under it.' "

See, also, to the same effect:

Waters-Pierce Oil Co. v. *Texas*, 212 U. S., 86.

C. & O. Ry. Co. v. *McDonald*, 214 U. S., 191.

There is not a word in the record of this case to show that defendant claimed in the trial court, that Sec. 5 should be construed as invalidating contracts like the one in question only in cases prosecuted under the act by employees against their employer. Counsel will doubtless rely upon defendant's request, and the court's refusal to give certain of its instructions, as presenting the question. The refused instructions referred to are Nos. 29, 30 and 31. (Rec., 563, 4.) There was nothing mentioned in the request of either of these instructions, nor in the exceptions taken to their refusal to indicate the theory upon which they were requested or the reason for the exception taken to their refusal; so whether the claim here urged can be said to have been made and especially set up, depends upon the wording of the instructions.

The refusal of Instruction 29 cannot be said to amount to a *denial* of the claim that Sec. 5 should be construed as above indicated, for its refusal was

proper for several reasons. First, it *assumes* that the C. B. & Q. and defendant were joint tort-feasors, whereas that was a debatable question in the case. All the C. B. & Q. did was to direct the plaintiff to take his train upon a route which required it to pass over defendant's track in question. Second, this instruction submits the question as to whether plaintiff accepted money *from* the C. B. & Q. *Railroad Co.*, whereas the evidence shows that the only moneys he received were received from the Burlington Relief Department, which was an organization formed by a number of railroad companies and their employees. (Rec., 432.) Third, this instruction submits the question whether plaintiff accepted the money "as damages for injuries that he sustained," whereas the evidence shows that the only moneys he received were accepted as *benefits* under and in pursuance with his contract of insurance with the Burlington Relief Department. If this instruction was properly denied for any of these reasons there is no warrant for the claim that its refusal was a denial of the claim that Sec. 5 should be construed as indicated.

But assuming that the instruction was in other respects proper, and that its refusal was warranted only upon the theory that Section 5 invalidated the contract, yet there is nothing in the instruction, or otherwise, to indicate that it was then claimed that Section 5 did not invalidate the contract, for the alleged reason that it *only* invalidates such contracts in suits under the act by employees as against their employers. There is nothing to indicate that such a claim was brought to the attention of the trial court

Defendants' claim that Section 5 did not invalidate the contract may, notwithstanding anything that appears in the record, have been based upon the ground that Section 5 did not apply to contracts *like the one in question,* or that by reason of plaintiff's counsel's agreement at the trial, plaintiff should not be permitted to avail himself of the benefit of Section 5. The truth is that these were the grounds upon which defendant relied at the trial, and for aught that the record shows the court may have refused the instruction upon the ground that these claims were untenable. At any rate, there is nothing in the record to show that the construction of Section 5 here contended for was claimed at the trial or that the court's attention was directed to such claim, and hence it cannot be said that it denied such claim.

Refused Instructions Nos. 31 and 32 merely purports to state the common law rule that a release to one joint tort-feasor is a release to all. Neither of these instructions was calculated to suggest to the court the claim here made.

Neither did the denial of the peremptory instruction (Rec., 513) call the trial court's attention to the claim here urged. The trial court would as likely conclude that the peremptory instruction was requested upon the ground that there was no evidence that defendant was guilty of negligence, or upon the ground that plaintiff was guilty of contributory negligence as that the contract of release was a bar to the action. As was said in *Oxley Stave Co.* v. *Butler County,* 166 U. S., 648:

"It is not enough that there may be *somewhere hidden in the record* a question which, if raised, would be of a Federal nature."

II.

THE GIVING OF PLAINTIFF'S INSTRUCTION NO. 9 DOES NOT PRESENT A FEDERAL QUESTION.

Judging from the petition for the writ of error, and the assignment of errors filed therewith, defendant apparently claims that the giving of plaintiff's Instruction No. 9 presents a Federal question. That instruction was as follows:

"If, under the evidence and instructions of the court, the jury find defendant guilty, and that plaintiff was entitled to damages, then, in the assessment of such damages you should not credit the defendant with any sum which the Chicago, Burlington & Quincy Railroad Relief Department paid to the plaintiff, or paid to any doctor, or other person, for or on account of the plaintiff." (Rec., 558.)

It will be observed that Section 5 is in part as follows:

"Provided that in any action brought *against any such common carrier under* or by virtue of any of the provisions of *this act, such common carrier* may set off therein any sum *it has contributed or paid* to any insurance, relief benefit or indemnity that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which said action was brought."

This instruction was requested upon the theory that *the carrier that had contributed* to the Relief Department was the *only one* that was entitled to any set-off on account of such contribution, but the Appellate Court held that defendant was entitled to a set-off for the amount which the C. B. & Q.

had contributed to the Relief Department. It found that the amount of the benefits paid to the plaintiff, which the C. B. & Q. had contributed to the Relief Department, to be $387.09, and it required plaintiff to enter a remittitur in that sum, which plaintiff did. (Rec., 580.) It is, therefore, apparent that defendant was credited upon the verdict with the sum that the C. B. & Q. would be entitled to be credited with in the event that the suit had been against it; and, consequently, defendant was not prejudiced by the giving of this instruction.

Upon this point the Illinois Supreme Court said that the judgment in the trial court was for $15,000, and that

"on appeal the Appellate Court for the First District required a remittitur of $387.09 to be entered, and the judgment was affirmed as to the remainder." (Rec., 587.)

And, continuing, the court said:

"To meet the case of defendant in error the plaintiff in error proved that he was and had been since 1902 a member of the Relief Department of the Burlington Company; that the employees of that company made monthly contributions to the relief fund; that the company maintained the department and bore the operating expenses and that he had accepted from the relief fund as benefits the sums of $1,231, and that $1,349.59 had been paid in his behalf for hospital bills, physician services, and the like. Of these amounts *the Burlington Company had contributed not to exceed 15 per cent, or $379.09* —the amount for which the Appellate Court required defendant in error to file a remittitur. * * * The court gave, at the instance of defendant in error, an instruction that if the jury found plaintiff in error guilty, then in the assessment of damages

they should not credit the plaintiff in error with what the Burlington Relief Department had paid to the defendant in error, or to any doctor or association on his account. * * * The giving of this instruction is assigned as error. (Rec., 590.) * * * The court erred in giving the instruction complained of, but that error was cured by the remittitur required and entered in the Appellate Court." (Rec., 591.)

We assume that this court will accept the State court's finding that the amount contributed by the C. B. & Q. to the Relief Department, toward the payment of benefits to plaintiff, and which was remitted from the judgment, is the correct amount of the C. B. & Q.'s contribution. But as defendant's counsel may probably claim, as they did in the Supreme Court, that the amount of the remittitur was not the correct amount which the C. B. & Q. thus contributed to the Relief Department, and as this court might for some reason feel called upon to ascertain the truth of the matter, we shall briefly refer to the evidence upon this point.

Plaintiff received in benefits until the time of the trial $1,200 (Rec., 404), and $1,349.50 was paid on his account for medical care, etc. (Rec., 408), making the total payments by the Relief Department on his account $2,549.50. The Relief Department paid in benefits to its members or their next of kin during the year 1908, the sum of $540,000. Of this sum the employes who were members of the Relief Department contributed $459,000, or 85% of the whole; whereas the associated companies contributed in services, facilities, etc., $81,000, or 15% of the whole. In 1909, the Relief Department paid in benefits $540,-

000, of which the employes contributed $462,000, or 85.56%, and the affiliated companies contributed in services, facilities, etc., $78,000, or 14.44%. In 1910, the Relief Department to, or for the plaintiff, viz., which the employees contributed $500,000, or 85.47%, and the affiliated companies contributed in services, facilities, etc., $85,000, or 14.53%. (Rec., 431.)

It is thus apparent that of the total sum paid by the Relief Department to, or for the plaintiff, viz., $2,549.50, the C. B. & Q. contributed not to exceed 15%, viz., $382.43, which is the amount of the remittitur entered in the Appellate Court. (Rec., 580.) But counsel claimed in the Supreme Court that it does not appear what the C. B. & Q. contributed to the Relief Department prior to the year 1908; the accident occurring December 15, 1908. The evidence shows, in effect, that the account was balanced each year, and as the question in this regard is as to the amount which the C. B. & Q. contributed to the fund, out of which plaintiff was paid benefits, and as plaintiff was paid no benefits until the end of the year 1908, it is immaterial what defendant may have contributed in the years prior to 1908. If the question was material, as the amount of its contribution differed but slightly in the years shown, it is a fair inference that its contributions were substantially the same in the prior years.

But counsel say the evidence does not show what amount was contributed by the C. B. & Q. in 1911; the trial occurring in May of that year. The evidence does, however, show the value of the facilities and services furnished by the C. B. & Q. to the Relief Department during the prior three years, and

there was no suggestion that the value of such facilities, or services, was different during the four months of 1911, preceding the trial, than they were during the three preceding years. In addition to furnishing such facilities and services, the C. B. & Q. also was required to temporarily advance moneys necessary to meet any deficit that might occur in the operation of the Relief Department; but the evidence affirmatively shows that there *was no deficit* in the years 1908, 9, 10, or in 1911, up to the time of the trial. (Rec., 431.) Hence, the exact amount of the credit, or "set-off," if any, to which the C. B. & Q. would have been entitled was definitely ascertained.

Again, as defendant seeks to stand in the shoes of the C. B. & Q., in this respect, if the C. B. & Q. was, or would be, entitled to any other or additional credit, or "set-off," *it was incumbent upon defendant to prove such "set-off."* The burden always rests upon the party claiming a "set-off" to prove the amount and value of such "set-off," and this rule should especially apply to a case like this, where the carrier has it in its power to prove the amount and value of such "set-off." Whereas the employe is usually unable to prove it.

There is nothing in the wording of Sec. 5, which casts the burden upon the employee to prove the amount, or value, of the "set-off" in a case like this.

As a matter of fact, we do not think defendant was entitled to any set-off.

We think Sec. 5 clearly means that it is only *the carrier that has contributed* to the benefit fund, that is entitled to the "set-off." Congress could hardly

have intended to allow one carrier a "set-off" on account of the contributions made by another carrier to the relief fund, when the carriers were strangers to each other, and it is clear that such construction cannot be given to Sec. 5 without disregarding the words used.

The fact that it was the intention that the "set-off" should only be allowed to the carrier that contributed is further evidenced by the fact that Section 5 provides:

"That in *any action* brought against any such common carrier, *under or by virtue of any of the provisions of this act,* such common carrier may 'set-off,'" etc.

An action can only be brought under the act by an employee against his employer, and in such cases the actions brought under the act are necessarily those only which can be maintained against the carrier that has contributed to the relief fund. The fact that Sec. 5, which allowed the "set-off," makes no provision for its allowance in any case, except in cases prosecuted under the act, clearly negatives the idea that the "set-off" should be allowed to a carrier that has not contributed to the relief fund, and which cannot be sued under the act.

III.

THERE IS NO FEDERAL QUESTION PRESENTED IN REFERENCE TO THE AGREEMENT MADE BY PLAINTIFF'S COUNSEL AT THE TRIAL.

We gather from the petition for the writ of error, and the assignments of error, filed therewith, that defendant's counsel claim that a Federal question is

presented in this regard, but we are, of course, unable to state counsel's exact position in this respect. The facts in reference to this alleged agreement are substantially as follows:

As previously stated, the original declaration charged that all the parties were engaged in interstate commerce at the time of the accident, whereas the additional counts contain no reference to interstate commerce. At the time the case was called for trial a plea of the Statute of Limitations had also been pleaded to the additional counts, and plaintiff had filed a demurrer to this plea. Defendant then sought to have the case continued upon the ground that the pleadings were not settled.

In answer to this claim plaintiff's counsel pointed out that the only substantial difference between the original declaration, and additional counts, was that the former alleged that the parties were engaged in interstate commerce, whereas the latter contained no such allegation. Plaintiff's counsel further stated that it was his opinion that a recovery could not be had under the Federal Employers' Liability Act and hence that the allegations that the parties were engaged in interstate commerce were immaterial and he therefore urged that plaintiff's demurrer to defendant's plea of limitations should be sustained, and that the case should proceed to trial; and thereupon, the demurrer was sustained, and the case was placed on trial.

During the presentation of plaintiff's original case he sought to prove that plaintiff and the C. B. & Q. were engaged in interstate commerce. Defendant objected to this evidence, and thereupon, a collo-

quy occurred between court and counsel substantially as follows:

"The Court: If I am not mistaken. I thought that proposition was not in this case.

"Mr. Everett (defendant's attorney): He told this court that was not in this case at the time *we argued the demurrer.*

"Mr. McShane (plaintiff's attorney): I said *I did not think this a necessary element in this case.* Now, whether it is in this case, or whether it is not, is a question beyond me. * * * If it is, why we want to prove the facts, that is all.

"Mr. Everett: He told your Honor that was not in this case, that he would withdraw it if the court sustained it.

"The Court: Let the reporter read the stipulation. * * *

"Mr. Everett: The reporter is not here that took the stipulation.

"Mr. McShane: We need not waste time on that. I said this, *as a bargain. He did not take me up at the time.* I said that I was *willing to agree, if necessary,* that that was not in this case. * * * I said that, but he did not take me up. I was willing to make the concession to get to trial.

"The Court: The only point is this: As far as it goes, it does not appear, but the gentleman seems to insist that he did not agree. *The court is not going to decide whether he did or not.*

"Mr. McShane: I said I would stipulate in this case that that feature (the interstate commerce feature) is out of the case. I said that * * * *but he kept on talking, 'No, no, you did this, you did that, you did the other,' then when he did not prevail,* whether I should be held— * * * The court did not consider that had anything to do with it. *I am inclined to think it is not in the case. That is my judgment on it.* But if there is anything in it that this man is entitled to, I want it, unless you say I ought not to have it. (Rec., 189.)

"The Court: Well, I don't see how I can do anything. *I want to find out what you said.*

"Mr. McShane: I said just that thing, that *I am willing* to stipulate that is not in this case. At that time, you did not pass on the other proposition (the demurrer to the plea of limitation), and I wanted a trial, and I was willing to make a concession. *He did not accept that concession.* (Rec., 189.) *It is my judgment it does not make any difference in this case. I am candid to say that.*

"Mr. Everett: It is my judgment *that is what you told the court before,* and the court took your word for it and sustained your demurrer.

"Mr. McShane: No, it had nothing to do with it.

"The Court: Well, you gentlemen seemed to make an agreement and I sustained the demurrer; I do not know why I did it, I know that.

"The Court (addressing plaintiffs' counsel): *If it is your judgment it is not in the case I think you had better keep it out.*

"Mr. McShane: Well, that is right, if you think I ought to do so." (Rec., 189.)

And thereupon the court struck out the testimony tending to show plaintiff and the C. B. & Q. were engaged in interstate commerce, and plaintiff went no further in the matter.

The agreement relied upon is not shown by the record, and as the bill of exceptions must be deemed defendant's pleading, it should be construed *most strongly against it.* (3 Ency. of Pl. & Pr., 509.) In determining what the agreement was, counsel's statements *as an admission against interest* should be regarded, yet all they show so far as plaintiff's counsel is concerned is that he was willing at the time and in order to prevent a continuance to admit that the interstate feature was not involved, which admission was not accepted; and that afterwards, upon

plaintiff's counsel reiterating the statement that he did not think that question was involved, he merely acquiesced in the court's statement, that if counsel was of that opinion, the court thought the evidence should be kept out, and it was kept out. The trial court's action in permitting plaintiff to avail himself of the benefit of the Federal Act so far as the release is concerned is proof positive that it did not regard the alleged agreement as sufficient to prevent plaintiff from doing so. The interstate feature was not involved in the case, and was not of importance at the time the alleged agreement was made, nor at the time the colloquy above quoted occurred. It became important only when defendant, in making out its case, sought to prove a release, and there was clearly nothing in this alleged agreement which would warrant the court in denying plaintiff the benefit of the Liability Act so far as it affects the release.

The alleged agreement could not possibly have had any greater effect than if there had been no allegations as to interstate commerce in the declaration, and if such had been the state of the pleadings, as defendant had the right to prove a release, or what it claimed was equivalent to a release, under the general issue, it would seem clear that in order to avoid the effect of that release, plaintiff had the right to prove any facts showing the alleged release to be invalid. What was said in reference to the matter at the *end* of defendant's case is shown in Rec., pp. 511, 512.

The Illinois Supreme Court disposed of this alleged agreement, as follows:

"In the course of the trial, evidence was offered on the part of defendant in error tending to prove that the engines and cars were engaged in interstate commerce, when an objection was interposed on the ground that *the question of interstate commerce had been eliminated* and the demurrer to the plea of the Statute of Limitations sustained by agreement. While *this stipulation or agreement does not appear in the bill of exceptions,* it does satisfactorily appear from what followed, when this objection was made, that *such an agreement* had been entered into. The evidence that had been offered on this question was then stricken out by the court, and no further evidence relating to interstate commerce was offered. Defendant in error had no cause of action against plaintiff in error under the Federal Employers' Liability Act, as that act applies only where the relation of master and servant exists. To meet the case of defendant in error, the plaintiff in error proved that he was and had been since 1902 a member of the Relief Department of the Burlington Company."

The court then proceeds to describe plaintiff's contract with the Relief Department, and that plaintiff accepted benefits in pursuance of the contract, etc. And, continuing, the court said:

"*Whether it had been stipulated during the presentation of defendant in error's case in chief that the question of interstate commerce was not in the case is immaterial. That stipulation simply left the case as though no such allegation had been made in the declaration.* When plaintiff in error attempted to prove a satisfaction by the payment of benefits by its joint tort feasor, the Burlington Company, to defendant in error, it was proper for defendant in error in rebuttal to show that no valid release had been given the Burlington Company by him. * * * The evidence in rebuttal was properly admitted."

The court thus found from the *evidence* as to what plaintiff's counsel's agreement was—that is to say, from the colloquy between court and counsel—that the agreement was not of such a character as would prevent plaintiff from relying upon the Act in order to meet and overcome a claimed defense which defendant had proven, and which the Act invalidates.

The case of *Hogarity* v. *Phila. & R. Ry. Co.*, 245 Pa. St., 452, decided by the Supreme Court of Pennsylvania, is almost identical in this respect with the case at bar aside from the agreement referred to. There plaintiff, a railway employee, sued to recover damages on account of personal injuries. *He did not charge in his declaration that he or defendant were engaged in interstate commerce or make any mention of the Federal Employers' Liability Act.* His proof made out a case at common law. *In defense* defendant proved that plaintiff was a member of its Relief Department, which department was almost identical with the Burlington Relief Department; that plaintiff accepted benefits due from the relief department, and in consideration of the payment of such benefits *executed a release releasing defendant from liability on account of his injuries,* yet under these circumstances the court held that plaintiff had a right to invoke the provisions of the Employers' Liability Act in order to invalidate the release. In that respect the court said:

"The Federal statute was not brought into the case at bar until a special defense was entered upon, and then the plaintiff promptly drew attention to its (Section 5) express prohibition of all defenses of the character of the one offered."

Whether, under the pleadings, the State court was, or was not, in error in permitting plaintiff to prove in rebuttal that he and the C. B. & Q. were engaged in interstate commerce does not present a Federal question.

It has been repeatedly held by this court, that whether the pleadings in a case, are or are not, sufficient to warrant the admission of certain evidence, or to authorize a recovery is a question of general, or local law, and does not present a Federal question.

C. V. Ry. Co. v. *White,* 238 U. S., 507.
Buena Vista Co. v. *Iowa Falls, etc., R. Co.,* 112 U. S., 156.
T. & N. O. R. Co. v. *Miller,* 221 U. S., 408 (416).
Railroad Co. v. *Butler,* 159 U. S., 87 (91).
L. I. W. S. Co. v. *Brooklyn,* 166 U. S., 685.
Johnson v. *Drew,* 171 U. S., 93.

It has been also repeatedly held that as a general rule the question of the admissibility or non-admissibility of evidence is a question of local law and does not persent a Federal question.

N. P. R. C. v. *Babcock,* 154 U. S., 190; 38 L. Ed., 958.
Sherman v. *Grinnell,* 144 U. S., 198; 36 *id.,* 403.

Aside from the question of the pleadings, and of the admission of the evidence, referred to, whether plaintiff's counsel made such an agreement as should preclude him from invoking the provision of Section 5 to invalidate the contract was a question of fact.

As will be noted, the agreement itself is not shown by the record. The only *evidence* as to what the agreement was are the statements of counsel, above referred to. This court will not go beyond the finding of the State Supreme Court and review this evidence to determine the character and scope of the agreement in question. If the application, or non-application, of the Federal Act depended upon what plaintiff's counsel's agreement was, this court will treat the finding of the State Supreme Court in that regard as final upon that question of fact.

Indeed, we do not think that plaintiff's counsel could have made any agreement which would estop the court from treating the contract in question as invalid under Section 5.

In 6 Ruling Case Law, Sec. 215, p. 819, it is said:

"The doctrine of *estoppel* by contract or by *laches* has no application to a contract or instrument which is void because it violates an express mandate of the law or the dictates of public policy. Such a contract has no existence whatever. It has no legal entity for any purpose, and *neither action nor inaction of a party to it can validate it, and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity.* The authorities are uniformly agreed on this principle."

We respectfully ask that the writ of error be dismissed.

Respectfully submitted.

JAMES C. MCSHANE,
Attorney for Defendant in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

No. 375

THE CHICAGO AND ALTON RAILROAD COMPANY,
Plaintiff in Error,

vs.

JOSEPH M. WAGNER,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR IN ANSWER TO MOTION OF DEFENDANT IN ERROR TO DISMISS.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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STATEMENT.

MAY IT PLEASE THE COURT:

This writ of error seeks to review a judgment of the Supreme Court of the State of Illinois.

We will refer to the parties by their titles in the trial court and to the other railroad companies mentioned, by initial letters as defendant in error has done.

The statement of our position and of the authorities relied upon to sustain the jurisdiction of this court, necessarily requires a discussion of the merits of defendants' case. We insist:

1. That a *Federal* right was claimed by defendant and denied by the State Courts.

2. That the Federal right was especially set up and preserved in the trial court.

The Federal question involved is the erroneous construction of Section 5 of the Act of April 22, 1908, commonly known as the Employers' Liability Act. (35 Stat., 65, Ch. 149 as amended 36 Stat., 291, Ch. 143.)

The question arose in the trial court in this manner: The plaintiff, *not an employee of the defendant,* but employed by the C. B. & Q. R. R. Co. as a conductor in charge of five baggage cars containing interstate freight, was injured by being crushed between the side of one of these cars, on which he was hanging, and a semaphore post, alleged to be dangerously near the track. He was a member of the C. B. & Q. Relief Department, which provided benefits to him during his inability to work. He was allowed by his Relief Department contract the alternative of accepting these benefits and releasing his employer (C. B. & Q.) from liability on account of his injuries, or of prosecuting his claim for damages (Tr., 377, Sec. 64.) He at first retained the checks of the Relief Department sent to him in payment of the first six months benefits, then decided to accept the benefits, cashed the checks, and from that time on, monthly, received and accepted the benefits sent under his membership agreement. The agreement provided (Tr., 366):

> "I also agree that in consideration of the amounts paid and to be paid by said Company for the maintenance of said Relief Department, and of the guar-

antee by said Company of the payment of said benefits, *the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims* against said Company and all other companies associated therewith in the administration of their Relief Departments, for damages arising from or growing out of said injury."

Our contention is that when plaintiff elected to receive, and did receive, the payment of benefits, that act constituted an accord and satisfaction and a release of his claim for injuries against the C. B. & Q.; and that under the law of Illinois, the satisfaction by, and release of, one tort feasor releases all who are or may be jointly liable. It was decided in *Eckman* v. *C. B. & Q.*, 169 Ill., 312, that the acceptance of such benefits constitutes a release and satisfaction. The decision of the State Supreme Court in the case at bar affirms that holding. (Tr., 590.) The proof made here upon this branch of the case (Tr., 359 to 433) was substantially identical with the facts of the *Eckman* case, and, for convenience, we refer to the *Eckman* decision for a description of the Relief Department organization.

It is contended by plaintiff, and the State Court holds, that Section 5 of the Federal Employers' Liability Act nullifies the effect of this release as to defendant. Except as to plaintiff's motion to dismiss for want of jurisdiction, because the Federal question was not properly saved, the proper construction of Section 5 is the only question for decision here.

We will demonstrate first, that this court has jurisdiction, and, later, that the decision of the State Court was erroneous.

ARGUMENT.

I.

A Federal Right Was Claimed by Defendant and Denied.

This court has jurisdiction because the defendant was denied a right, privilege and immunity under the Federal Statute, viz: The right to the holding that Section 5 has no application, and does not nullify the release. (Tr., 599.)

Defendant claimed that Section 5 of the Federal Employers' Liability Act should be so construed:

1. As not to invalidate any contract, rule, regulation, or device mentioned therein, to the extent that the acceptance of benefits under such contract should operate as a release of a person other than the employe's employer from a liability not created thereby.

2. As not to invalidate any such contract, etc., except in so far as its purpose or effect was to release the *employer* from a *liability created by the Act.*

3. As not to invalidate any contract, rule, regulation, or device mentioned therein, in so far as the acceptance of benefits thereunder operated as a release when such acceptance of benefits by the employe from his employer was relied upon as a release by the defendant, a joint tort feasor, not his employer, sued by the employe on a liability not created by the Act.

Defendant therefore asserted, in the trial court, a construction of that section which, if acceded to, would have produced a verdict in its favor and consequent immunity from the action. Its contentions as to how the sec-

tion should be construed were denied. By erroneously construing and applying section 5 to this case, the State Supreme Court nullified the release (which is concededly good under the common law in force in Illinois) and permitted plaintiff to recover.

It appears from the record herein that defendant expressly claimed that such section should be so construed and that it was inapplicable. It further appears that the Supreme Court of Illinois expressly decided that the record sufficiently presented the construction of the section for which defendant contended.

The majority opinion concedes that the release would be effective, at common law, as to defendant. (Tr., 602.) The dissenting opinion states that Section 5 has no application and the release should be given effect and the judgment of the Appellate Court reversed.

The trial court overruled defendant's contention and decided against its asserted right. This court will pass upon the merits of such a Federal question.

Plaintiff's contentions that the section should be so construed as to permit of its application to the release proven, thus invalidating it, were sustained. Had defendant's contention in this regard been sustained and plaintiff's been overruled, defendant would have been given a directed verdict and judgment.

This court has held that where a State court of last resort sustained the trial court in overruling contentions made by a plaintiff in error asserting a construction of the Federal Employers' Liability Act which, if acceded to, would presumably have produced a verdict in its favor and consequent immunity from the action against it, a Federal question is presented giving it jurisdiction.

In *Seaboard Air Line Railway* v. *Horton,* 233 U. S., 492, where the Supreme Court of the State of North Carolina sustained the trial court in overruling certain contentions made by the Railway Company as to how the Act should be construed in reference to assumed risk, it is said on page 499:

> "There is a further motion to dismiss for want of jurisdiction, upon the ground that no right, privilege, or immunity under the Employers' Liability Act was especially set up or claimed in the State court of last resort and by the court denied, but since that court sustained the trial court in overruling certain contentions made by plaintiff in error asserting a construction of the Act which, if acceded to, would presumably have produced a verdict in its favor and consequent immunity from the action. This motion must be denied upon the authority of *St. Louis, Iron Mountain & Southern Railway* v. *McWhirter,* 229 U. S., 265."

In the *McWhirter* case this court held that a ruling duly excepted to, inherently involving the operation and effect of the Federal Employers' Liability Act, was reviewable here.

In *St. Louis & Iron Mountain Ry.* v. *Taylor,* 210 U. S., 281, plaintiff in error objected to an erroneous construction of the Safety Appliance Act which warranted on the evidence a judgment against it and insisted upon a correct construction of the Act which warranted on the evidence a judgment in its favor. The Act was erroneously construed in given instructions and rightfully construed in those tendered but refused. This court held the denial of the Railway Company's claims were decisions of Federal questions reviewable here, saying on p. 292:

> "The words of that section material here are those authorizing this court to re-examine the judgments of the state courts 'where any title, right, privilege, or immunity is claimed under * * * any statute

of * * * the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed under such * * * statute.' There can be no doubt that the claim made here was specifically set up, claimed, and denied in the state courts. The question, therefore, precisely stated, is whether it was a claim of a right or immunity under a statute of the United States. Recent decisions of this court remove all doubt from the answer to this question. *McCormick* v. *Market Bank*, 165 U. S., 538; *California Bank* v. *Kennedy*, 167 U. S., 362; *San Jose Land and Water Co.* v. *San Jose Ranch Co.*, 189 U. S., 177; *Nutt* v. *Knut*, 200 U. S., 12; *Rector* v. *City Deposit Bank*, 200 U. S., 405; *Illinois Central Railroad* v. *McKendree*, 203 U. S., 514; *Eau Claire National Bank* v. *Jackman*, 204 U. S., 522; *Hammond* v. *Whittredge*, 204 U. S., 538. The principles to be derived from the cases are these: Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. *But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union.*" (Italics ours.)

The following cases demonstrate that the denial of defendant's asserted construction of Section 5 presents a Federal question. In each of them this court held reviewable, questions relating to the applicability or non-applicability of the Federal Employers' Liability Act.

Seaboard Air Line Ry. v. *Tilghman*, 237 U. S., 487.

Toledo, St. Louis & Western R. R. Co., v. *Slavin*, 236 U. S., 454.

Seaboard Air Line Ry. v. *Padgett*, 236 U. S., 668.

Southern Ry. Co. v. *Crockett*, 234 U. S., 725.

M. K. & T. Ry. Co. v. *West*, 232 U. S., 682.

In *Nutt* v. *Knut*, 200 U. S., 12, an attorney sued on a written contract whereby he was employed to prosecute a claim against the United States. Defendant resisted his claim on the ground that the contract was void under Par. 3477 Rev. Stat., prohibiting transfers of claims against the United States. Defendant's claim was denied. This court, in denying the motion to dismiss, and in affirming the judgment, on page 19, says:

> "A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of section 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary. Such has been the view taken in many cases where the authority of this court to review the final judgment of the state courts was involved. *Logan County Nat. Bank* v. *Townsend*, 139 U. S., 67, 72; *Railroads* v. *Richmond*, 15 Wall., 3; *Swope* v. *Leffingwell*, 105 U. S., 3; *Anderson* v. *Carkins*, 135 U. S., 483, 486; *McNulta* v. *Lochridge*, 141 U. S., 327; *Metropolitan Bank* v. *Claggett*, 141 U. S., 520; *McCormick* v. *Market Bank*, 165 U. S., 538, 546; *California Bank* v. *Kennedy*, 167 U. S., 362."

In *McCormick* v. *Market Bank*, 165 U. S., 538, in an action against a national bank upon a contract, each party relied on Sec. 5136 of the Rev. Stat., by which a national bank upon filing its articles of association and organization certificate with the comptroller of the currency becomes a corporation with power "to make contracts" and other corporate powers, but is prohibited "to trans-

act any business except such as is incidental and necessarily preliminary to its organization" until it has been authorized by the comptroller of currency to commence the business of banking. The defendant relied on the prohibition. The plaintiff relied on the exception to the prohibition, and also contended that under the general power to make contracts, the contract sued on—a lease for a banking office for five years—was valid as between the parties even if contrary to the prohibition. Defendant was given a judgment. This court, in holding that a judgment for the defendant in the Supreme Court of the State of Illinois might be reviewed on writ of error, on page 545 says:

> "The defendant contended, and the highest court of the State of Illinois adjudged, that the contract of lease sued on was not incidental and necessarily preliminary to the organization of the corporation, and therefore, by virtue of the last clause of section 5136 of the National Bank Act, above cited, having been executed by the defendant before being authorized by the comptroller of the currency to commence the business of banking, did not bind the defendant.
>
> If the decision had been the other way, it would, as admitted at the bar, have been a decision against an immunity set up and claimed by the defendant under a statute of the United States, and therefore reviewable by this court on writ of error. *Swope* v. *Leffingwell*, 105 U. S., 3; *Logan County Bank* v. *Townsend*, 139 U. S., 67; *Metropolitan Bank* v. *Claggett*, 141 U. S., 520; *Chemical Bank* v. *Hartford Deposit Co.*, 161 U. S., 1.
>
> It does not, however, follow that the plaintiff is not entitled to a review by this court of the judgment, so far as it was against him.
>
> The plaintiff, in the courts of the state, and by his assignment of errors filed with the writ of error sued out from this court, specially set up and claimed a right to recover, so far as concerned the construction of that section of the statute, upon two grounds.
>
> His first ground was that the execution of the lease by the defendant was 'incidental and necessar-

> ily preliminary to its organization,' and therefore within the exception of the last clause of the section in question. As to that ground, the case stands thus: The defendant relied on the prohibition to transact any business until it had been authorized by the comptroller of the currency to commence the business of banking. The plaintiff relied on the exception out of that prohibition. The decision against the plaintiff, therefore, was a decision against a right claimed by him under a statute of the United States."

The following cases, involving statutes other than the Federal Employers' Liability Act, demonstrate that the denial of this asserted construction and the trial court's misapplication of Section 5, affirmed by the Supreme Court of Illinois, presents a Federal question.

El Paso Northeastern Ry. v. *Gutierrez,* 215 U. S., 87.

Straus v. *American Publishers' Assn.,* 231 U. S., 222, 233.

Houston & Texas Central Rd. Co. v. *Texas,* 177 U. S., 66, 77.

Buel v. *Van Ness,* 8 Wheat., 311, 321.

Mathews v. *Zane,* 4 Cranch., 381.

II.

THIS COURT HAS JURISDICTION BECAUSE THE STATE SUPREME COURT CONSTRUED THE FEDERAL ACT DENYING DEFENDANT IMMUNITY.

The majority opinion holds that the Federal question was raised when plaintiff proved over objection of defendant, in rebuttal that he and the C., B. & Q. were engaged in interstate commerce and that it was error to give at plaintiff's request instruction No. 9 (Tr., 558) because Section 5 applied, but held the remittitur cured

the error. (Tr., 589-591.) The dissenting opinion refers to these points in this language:

> "The facts proved by the defendant were sufficient to establish under the law of this state a satisfaction by the Burlington Company of the plaintiff's injury and damages, and the evidence admitted in rebuttal was for the purpose of destroying that defense by means of the Federal Employers' Liability Act, which gave no cause of action to the plaintiff and under which the suit was not and could not have been brought. * * * But Congress can not and has not attempted to determine what shall be the policy of a state or what its laws shall be. There is no act of Congress which would give any right of action in favor of the plaintiff against the defendant, whether engaged in interstate commerce or not. Congress has not legislated on that subject at all. * * * (Trans., 543.) The proviso to Section 5 of the federal statute allowing the employer to set off any sum it has contributed to a relief benefit or indemnity fund is expressly limited to actions brought under or by virtue of the provisions of the Act, and neither that proviso nor anything contained in the Act relates in any way to an action brought under a state law. If the plaintiff had sued his employer, the Burlington Company, and alleged that the injury occurred while the engines and cars were engaged in interstate commerce, the federal statute would apply, and the employer could only set off against the damages the sum contributed to the relief fund, but if the plaintiff had brought *this suit* against the Burlington Company, the evidence of membership in the Relief Department and the receipt of benefits would have established a satisfaction for the injury and have been a complete defense."

This court held in *Mallinckrodt Chemical Works* v. *the State of Missouri*, 238 U. S., 41:

> "There is a motion to dismiss, based upon the ground that the federal questions here set up were not raised in the trial court, or in the Supreme Court of the state, with sufficient definiteness to comply with section 237 Jud. Code (Act of March 3, 1911,

36 Stat., 1087, 1156, ch. 231). It appears, however, from the opinion of the Supreme Court (249 Mo., 704 (8), 733), that the question of equal protection under the Fourteenth Amendment was treated as being sufficiently raised, and was specifically dealt with and ruled against plaintiff in error. This is sufficient to confer jurisdiction upon the court, and the motion to dismiss must be denied."

To the same effect is the case of *Chambers* v. *Baltimore & Ohio Railroad Co.*, 207 U. S., 142, wherein it was said on p. 148:

"The defendant objects to our jurisdiction to re-examine the judgment because the federal question was not properly and seasonably raised in the courts of the state. But it clearly and unmistakably appears from the opinion of the Supreme Court that the federal question was assumed to be in issue, was decided against the claim of federal right, and that the decision of the question was essential to the judgment rendered. This is enough to give this court the authority to re-examine that question on writ of error. *San Jose Land & Water Company* v. *San Jose Ranch Company*, 189 U. S., 177; *Haire* v. *Rice*, 204 U. S., 291."

In *Home for Incurables* v. *City of New York*, 187 U. S., 157, the rule is stated:

"Later cases in this court have expressed the additional thought that if the highest court of the state assumes that the record sufficiently presents a question of federal right, we will look no further, and will proceed to a consideration of that question, unless the decision is made to rest, in part, upon some ground of local law, sufficient enough in itself to sustain the judgment, independently of any question of federal right."

In *Missouri, Kansas & Texas Railway Co.* v. *Elliott*, 184 U. S., 530, it was held that even though the allegations of federal right were so general and ambiguous in their character,

"That they would not in themselves necessitate

the conclusion that the right of a federal statute was brought to the attention of the state court, yet if the state court in deciding the case has actually considered and determined a federal question, although arising on ambiguous averments, then a federal controversy having been actually decided the right of this court to review obtains."

III.

THE FEDERAL QUESTION WAS SPECIFICALLY RAISED.

The Supreme Court of Illinois rightfully decided that the record sufficiently presented a Federal question. It is clear from the record that it was specifically raised in the pleadings, both before and during the trial, as well as by objections to the admission of evidence, by the instructions, the motion for a new trial, and the assignments of error in both the Appellate and Supreme Courts.

The original declaration had but one count and averred plaintiff and defendant were engaged in interstate commerce. Obviously, as plaintiff and defendant did not bear the relation of employer and employee, plaintiff only made this averment that he might contend the Employers Liability Act applied, to the extent of nullifying the release. Defendant's plea of general issue, under the Illinois practice, denied the averment of engagement in interstate commerce, and put this in issue.

When the case was called for trial it was not at issue because the plaintiff had filed a demurrer to defendant's plea of the statute of limitations to the additional counts. The additional counts stated a cause of action only under the common law. The original count remained in the case notwithstanding defendant's motion to exclude the evi-

dence as to it, at the close of the case (Tr., 511), and defendant's instruction No. 36 (Tr., 564), which it requested the court to give to the jury, but the court refused. This instruction was:

> "The court instructs the jury that the plaintiff cannot recover under the first count of the declaration."

This Federal question was actually raised before the trial began in this manner:

The plaintiff's counsel, in order to obtain an immediate hearing, agreed that the interstate commerce feature "was not in the case," and the defendant acting and relying upon his good faith agreed to and did proceed to trial. Both State Supreme Court opinions find this agreement was made. It is stated in the majority opinion:

> "While this stipulation or agreement does not appear in the bill of exceptions, it does satisfactorily appear from what followed when this objection was made that such an agreement had been entered into." (Tr., 605.)

The dissenting opinion states:

> "The bill of exceptions shows that the plaintiff withdrew all questions relating to Interstate Commerce, for the purpose of having a demurrer disposed of, and having an immediate trial, and all claims growing out of any act regulating interstate commerce were thereby eliminated from the case." (Tr., 606.)

Plaintiff's brief refers to only part of the record showing this agreement. The point that this agreement was controlling was raised and urged by defendant when plaintiff, in making his case, first attempted to prove the contents of the car, and that it was sealed with government seals, which would indicate it contained imported (bonded) merchandise. (Tr., 186-187.) The defendant insisted that counsel for plaintiff should be held to his

agreement, that no Federal Act was in the case. (Tr., 188-189.) It objected to the admission of evidence tending to prove the interstate commerce feature as soon as this was offered, and again when plaintiff offered this proof in rebuttal. (Tr., 495.) Plaintiff's counsel knew before trial, and at the time he made the agreement, that defendant relied upon the release to the C. B. & Q. as a defense. When plaintiff, called on his case in chief, was cross-examined, it was shown that he had another suit pending against the C. B. & Q. for the same injury. (Tr., 226.) He was then shown the checks in payment of the benefits and was asked:

> "Q. Look at these various checks and answer whether or not those are your signatures on them.
>
> Mr. McShane (attorney for plaintiff). I object to it, if the court please, as not cross-examination. *I know perfectly well what this is and I am perfectly willing to meet it. It is a matter of defense. He belonged to the Relief Department of this road* * * * *we will have no trouble about it. I am willing to meet it. It is not cross-examination but simply a matter of defense.*" (Tr., 227.)

This clearly shows that counsel for plaintiff knew that defendant relied, as a defense, upon the acceptance of benefits by plaintiff as a release to the C. B. & Q., a joint tort feasor; and that he also relied upon Section 5 of the Federal Act to nullify the effect of the release. His attitude is expressed in the statement made by him when the court said he thought that proposition (the Federal Act) was not in this case:

> "I do not think it is a necessary element in this case. Now, whether it is in this case or whether it is not, is a question beyond me, if the court please. The Supreme Court in passing upon that Employers' Liability Law is extending it to one thing and another. Whether it is in this case, I do not know, but if it is, why, we want to prove the facts, that is all. * * * We need not waste time on that. I

said this rather as a bargain; he did not take me up at that time. I said I was willing to agree, if necessary, *that that was not in this case.* * * * *If the court thinks I ought to be held by that, well and good.*" (Tr., 188-189.)

At this point the trial court, upon counsel's agreement, struck out the evidence relating to interstate commerce. (Tr., 190-191.)

When defendant, at the commencement of its defense, offered the 29 checks previously identified by plaintiff, his counsel objected, saying:

"Mr. McShane: I want to object, your Honor, to the introduction of these checks. I think this objection will run to all matters pertaining to the Relief Department. I object to their introduction upon the ground, first, that there is no privity of contract—

Mr. Everett: There is nothing before the court as to the Relief Department.

Mr. McShane: I am stating my objection. First, on the ground that there is no privity of contract between the Alton Railroad Company and the plaintiff, secondly, *because the contract itself is contrary to public policy and void under the federal law.* But I ask the court to reserve its ruling on that objection until all of this matter has been heard, I think it all ought to be in there, I ask that it go in under objection." (Trans., 292.)

The court admitted them subject to further consideration. Later, when defendant was offering in evidence the regulations of the Relief Department of the C. B. & Q., Mr. McShane stated:

"I only want to say, without stopping, for all this, to all this Relief Department proof, I make the objection that I have heretofore stated, but I request the court to postpone the ruling, as to whether it is right—in the meantime, let it go on—and later when it is all in." (Trans., 358.)

When defendant rested its case, plaintiff was called in rebuttal, and over defendant's objection, the trial court

allowed plaintiff to make proof of interstate commerce facts. An argument was made at plaintiff's request, out of the hearing of the jury. He then said:

> "I want to be heard, if your Honor please, for just a moment. *I want to prove that interstate feature*" (Tr., 489);

then continued to state to the court that it was his purpose to prove the interstate commerce feature for the purpose of asking the court to apply Section 5 of the Employers' Liability Law, and thereunder nullify the effect of the release. (Tr., 489.) Defendant again insisted that counsel had agreed the interstate commerce question was out of the case (Tr., 489), its counsel stating:

> "If he insists now that the interstate commerce proposition is in this case, I ask that a juror be withdrawn and the case continued, and we be permitted to argue our plea of the Statute of Limitations." (Tr., 490.)
>
> "Mr. McShane: I do not know how to make it more clear, but I think the court understands my point.
>
> The Court: All right, I will hear you in chambers. The jury may have a recess of five minutes.
>
> (Whereupon the jury were temporarily excused and left the court room. Court and counsel thereupon repaired to his Honor's chambers and proceeded to argue at length the question of the admissibility of testimony by the plaintiff to the effect that he was engaged in interstate commerce at the time of the injury in question. During the course of the argument and before the completion of the same, an adjournment was taken until 9:30 o'clock A. M. of the next day.)" (Trans., 490.)

The record does not show this argument.

The following morning, the argument was resumed, "The defendant, by its counsel, objecting to the admission of such testimony." (Trans., 490.)

The court denied the motion to withdraw a juror, overruled defendant's objection to the admissibility of the

evidence, and permitted plaintiff to prove, for the sole purpose of nullifying the effect of the release, that plaintiff and the C. B. & Q. were engaged in interstate commerce. The point again appeared when witness A. H. Ahr was called by plaintiff, in rebuttal, and his competency was objected to because he had remained in the court room in violation of an order entered by the court excluding the witnesses during the trial. This objection was overruled after the statement by plaintiff's counsel:

> "*I promise you that it is not on the interstate commerce proposition at all*—it is not a matter that Wagner (plaintiff) referred to; it is on the post and nothing else." (Tr., 506.)

The point was next specifically raised at the close of all the evidence when counsel for defendant stated:

> "Now, I move to exclude the evidence as to the first count of the declaration, so far as it applies—so far as that evidence is meant to support the charge that the movements of the train in question were movements made by it while engaged in interstate commerce. The proof is at variance with the declaration and the charges of the first count in that respect." (Tr., 511.)

When this motion was made, plaintiff's counsel insisted it had been agreed that defendant would not raise the point of variance, because of the agreement that the interstate commerce question was not in the case. Defendant's counsel said: "I ask you, do you claim it has been disposed of by our agreement? If so, I will stand by it." * * *

Plaintiff's counsel replied:

> "If language conveys anything, I say it is an answer that I do not claim a right of action against the road under and by virtue of the Federal Employers' Liability Act." (Tr., 512.)

The question was next raised specifically by plaintiff

when he presented the following special interrogatory or finding which the court submitted to the jury:

> "Q. Do you find from the evidence that on December 15, 1908, the C. B. & Q. R. R. Co. was engaged in interstate commerce between two or more states, and that the plaintiff was injured while employed by defendant in such commerce?
>
> Answer yes or no.
>
> You will write your answer below here and return it—attach to your verdict and return it."

Defendant excepted to the submission of the interrogatory. (Tr., 556.) The jury returned it into court, answering: "Yes." (Tr., 565.)

The question was next specifically raised when plaintiff offered, and the court gave, over defendant's exception, to the jury, instruction number 9 (Tr., 558)—in which the jury was advised that it could not credit defendant with any sum the C. B. & Q. Relief Department had paid to plaintiff. This was an effort on the part of plaintiff to evade part of the provisions of Section 5. The Appellate Court held (and was affirmed by the Supreme Court) that the instruction was erroneous, but that the error was cured by the remittitur from the amount of the verdict. Clearly in this the Appellate and Supreme Courts applied the latter part of Section 5:

> "Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

Defendant, again insisting the section had no application, offered instruction number 29 (Tr., 563), stating in substance that the release to the C. B. & Q. is a bar to this action against defendant. The court refused to

give it, necessarily upon the theory that Section 5 had application. Instruction number 30 (Tr., 563), offered by defendant and refused by the court, in substance stated the law to be that where an injured person receives satisfaction from one of several who are jointly liable, such payment releases all joint tort feasors. Instruction number 31, offered by defendant and refused (Tr., 564), in substance presented the same subject. Instruction number 33 (Tr., 564), offered by defendant and refused, stated the law to be that as plaintiff was not engaged in interstate commerce, Section 5 is inapplicable. Instruction number 34, offered by defendant, and refused, was in substance the same. Instruction number 36, offered by defendant and refused, stated that plaintiff could not recover under the first count of his declaration, which averred he and defendant were engaged in interstate commerce (Tr., 564). Defendant excepted to the court's ruling on each of these instructions. (Tr., 564.)

These same points were again specifically raised by points 3, 4, 5, 10, 11 (Tr., 565), and 12 (Tr., 566) of defendant's written motion for a new trial; and this question was also presented by point 27 thereof (Tr., 567).

> "The court erred in refusing to hold plaintiff's counsel to his agreement and stipulation in reference to the interstate commerce law affecting the case, and in permitting plaintiff, in rebuttal, to offer and make proof that the plaintiff was engaged in the operation of a train that was engaged in interstate commerce."

In the Appellate Court, by assignments of error, the grounds alleged in the motion for a new trial were presented for review (Tr., 571), and the assignments of error made in the Supreme Court brought up the same question (Tr., 582).

It may be that the court's ruling permitting plaintiff's counsel to break his agreement does not, in itself, present a Federal question, but it conclusively proves the question was raised and ruled upon, and that the question now presented was in the case before the trial started. The objection to the admissibility of the evidence and the argument at length in chambers on that objection presented a Federal question. The only purpose of admitting the evidence was to bring into the case the construction and effect of Section 5.

This court has held that it is not indispensable that it should appear on the record in *totidem verbis* or by direct and positive statement that the question was raised and the decision given by the court below on the very point. It is sufficient if it is clear from the facts stated, by just and necessary inference, that the question was made and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment. If this court is able to see clearly from the whole record that a certain construction of an act of Congress was relied upon by the party who brings the writ of error and that the right thus claimed by him was denied, the Federal question is saved.

This judgment depends exclusively upon the construction and application of this Federal question. Both parties anticipated it before the trial. It was argued fully during the trial and on the motion for new trial and in both reviewing courts. Up to the present time plaintiff's construction of Section 5 has been adopted and defendant's denied. Both the Appellate and Supreme Courts in their opinions have decided the Federal question, thereby holding it properly presented by the rec-

ord. On that question alone two of the justices of the State Supreme Court dissented. They decided that the right for which defendant contended had been erroneously denied.

Defendant has "especially set up and claimed" a right under the Federal Employers' Liability Act and has been denied such right by all the State courts.

IV.

THE FEDERAL RIGHT WAS ERRONEOUSLY DENIED.

In defense the defendant proved, without contradiction, plaintiff had been paid and had accepted the benefits provided by the Relief Department, thereby releasing the C., B. & Q., a joint tort feasor.

The proof here is the same as that made in *Eckman* v. *C., B. & Q.*, 169 Ill., 312, which decision made the state law on that subject. The State Supreme Court (both opinions) holds that this defense is a complete bar, if Section 5 of the Federal Act is not applicable. The controversy is therefore reduced to the single question of the construction and application of Section 5.

When plaintiff offered to prove that he and his employer, the C. B. & Q., were engaged in interstate commerce at the time he was injured and asked that Section 5 of the Act be construed so as to invalidate the release of the C., B. & Q. resulting, at law, from plaintiff's acceptance of the relief benefits, defendant contended that the admissibility of such proof and that application of Section 5 was erroneous because:

1. Plaintiff did not sue to establish a liability created under the act and defendant did not seek to prove a release therefrom.

2. In any action *not* between a railroad employe and railroad employer this section was inapplicable for *any* purpose.

3. This section was only applicable when an employe sued his employer to establish a liability created by the Act.

4. The release could not be invalidated even as between the employe and his employer until a suit was brought by the one against the other to establish a liability created by the Act.

5. The release if invalidated at all as to the C. B. & Q. was only invalidated to *the extent* that it prevented the C., B. & Q. from being released from a liability created by the Act. It was not invalidated to *the extent* that it aided others in being released from their liability under the common law. Congress didn't legislate on that subject.

6. No Federal law, however, controlling between plaintiff and defendant, a stranger, had superseded the common law governing their relations. No Federal law had superseded the common law of Illinois which holds that the release of one joint tort feasor constitutes a release of all. Congress might have legislated in respect to the relations existing in this case between plaintiff and defendant. It has not done so. Defendant has therefore all its common law rights against plaintiff.

7. If Section 5 can be applied in this case, then, why not Section 3, which modifies the common law defense of contributory negligence? The instructions indicate that the common law doctrine of contributory negligence was applied. If the common law defenses of the fellow servant, assumption of risk and contributory negligence, as modified by the Federal Act, could not be applied to our defense, then, upon what theory are the provisions of

that act applied, as affecting a release which has force and effect under the common law?

8. The plaintiff asserted his rights under the common law. It is not equitable that the defendant should not have the benefit of all the defenses allowed by the common law. This view is expressed in the dissenting opinion. Mr. Justice Cartwright states (Tr., 608):

> "In an action brought under the state law the defendant is as much entitled to the benefit of the law as the plaintiff. If the law of this state was good for the purpose of recovery, it was equally good to establish a defense against the cause of action existing under the same law. To say that a law regulating the rights and duties of parties and giving a right of action for a violation of such rights and duties, and declaring what shall be a release of such right of action, is available for sustaining the action, and not available for a defense, *is to destroy that equality of right which the law is intended to and must preserve.*" (Our italics.)

9. If this judgment is affirmed, the plaintiff will receive *double compensation for his injuries.* At the time of the trial he had received $1,231 as benefits; (Tr., 607) and $1,349.50 had been paid for hospital bills, physicians' services, and the like, and he "was still receiving similar benefits from the fund, and would continue to receive them while disabled." (Tr., 608.)

We have in this case plaintiff's acceptance of his benefits from the C., B. & Q. The common law in Illinois to-day is that such acceptance of benefits constitutes a release. Such common law would be applied to-day if plaintiff sued the C., B. & Q. for injuries he received, while not engaged in interstate commerce.

Undoubtedly Section 5 has invalidated the release proven to some extent. To the extent that Section 5 has not invalidated it, it remains valid. The section spe-

cifically provides to what extent the contract, rule, regulation, or device shall be void. It shall be void to the extent that its purpose or intent shall be to enable any common carrier to exempt *itself from any liability created by the Act.* This express provision, to what extent the contract *shall be void,* amounts to an express provision that for *all other purposes it shall be valid.* Prior to the passage of this act the effect of this "relief benefit" release, when proven by a joint tort feasor, was to release that joint tort feasor. It not only had that effect, but it released from liability the company operating the relief department.

To the extent that it released the party with whom it was made Congress has legislated; to the extent that it released such party's joint tort feasor Congress has not legislated.

We contend that plaintiff to-day could sue the C., B. & Q. under the contract for unpaid relief benefits, and recover. His contract would be valid in any litigation in which it might arise except to the extent that it released the C., B. & Q. from the liability created by the Act. Had the C., B. & Q., instead of paying the defendant compensation for the use of the track in question, agreed to indemnify the defendant against loss from liability by reason of personal injuries to its employes and had the C., B. & Q., to save itself from such liability over, organized a relief department similar to the one involved here, intending to have the acceptance of benefits operate as a release of defendant by operation of the common law, its contract with its employes, having such purpose or intent would not fall within the prohibition of Section 5. Congress might, under its power to regulate interstate commerce, have invalidated a contract having such intent or purpose, but it has not so legislated.

In other words, prior to the passage of this Federal Act, the acceptance of these benefits had certain possible effects. The acceptance of them under certain circumstances constituted a release of a joint tort feasor of the employe's employer. Congress has invalidated such release only to the extent that they shall enable the employe's railroad employer to exempt itself from a liability for negligence occurring at a time when both employe and employer were engaged in interstate commerce. It has left them valid to the extent that they shall operate as a release even when there has been negligence, but both employe and employer have not been engaged in interstate commerce. It has left them valid when no negligence of the carrier has been established. It has left them valid for the employe to recover his unpaid benefits. It has left them valid *for every other purpose* than the one named in the section. It has not invalidated the effect of operating, under the circumstances shown here, as a release of a joint *tort feasor.*

Congress has never attempted to exercise its power of regulating interstate commerce as between railroad companies and persons not their employes. It therefore has not legislated in relation to any contract, rule, regulation or device in evasion of a railroad's liability to another's employe.

In *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire,* 219 U. S., 549, in holding that the Iowa statute, which provided that the acceptance of relief insurance by the person injured should not constitute any bar or defense to any cause of action brought under the provisions of the section creating the liability, did not impair the liberty of contract guaranteed by the Fourteenth Amendment, this court says, on page 571:

"It was as competent to prohibit contracts which

> on a specified event or in a given contingency should operate to relieve the corporation from the statutory liability which would otherwise exist as it was to deny validity to the agreements of absolute waiver."

That statute, like Section 5 of the Federal Employers' Liability Act, related only to contracts releasing the employer from the liability created by the statute.

This court, in *Missouri, Kansas & Texas Ry. Co.* v. *West*, 232 U. S., 682, had before it the question whether the action was governed by the statutes of Oklahoma or the Federal Employers' Liability Act. This question turned upon whether the testator of defendant in error was employed at the time of his death by the plaintiff in error or the American Express Company. Defendant in error sued as the testator's widow and for the benefit of herself and three minor children. No personal representative of testator's estate was appointed. Plaintiff in error contended that defendant in error was not the proper party to maintain the action. In reference to this contention this court said (p. 690):

> "Upon it depends the federal question, that is, whether the laws of Oklahoma control the action or the Employers' Liability Act. * * * And this turns necessarily upon the other question, whether the deceased was employed by the Railway Company or by the Express Company."

This court therefore holds that unless the relation of employer and employe obtains between the parties to the suit no part of the Federal Employers' Liability Act is applicable.

To the same effect is the recent decision of this court in *Robinson* v. *Baltimore & Ohio R. R. Co.*, 237 U. S., 84. In that case a person who was held to be an employe of the Pullman Company sued the Baltimore & Ohio Railroad Company for injuries. The latter company proved that in Robinson's contract of employment with the Pull-

man Company he had released all railroad corporations, over whose lines the cars of that company might be operated, from all claims on account of personal injury or death. Plaintiff in error contended such release was invalid under Section 5 of the Federal Employers' Liability Act. This court in that case, on page 91, said:

> "The substantial question is whether the contract of release was invalid under Section 5 of the Employers' Liability Act of April 22, 1908, C. 149, 35 Stat., 65, which provides that any contract * * * the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act shall to that extent be void. *The application of this provision depends upon the plaintiff's employment,* for the liability created by the Act is a liability to the employes of the carrier and not to others, *and the plaintiff was not entitled to the benefit of the provision unless he was employed by the Railroad Company within the meaning of the Act.*"

In the conclusion of its opinion, the court again says, on page 92:

> "The inquiry rather is whether the plaintiff comes within the statutory description, that is, whether upon the facts disclosed in the record it can be said within the sense of the Act that plaintiff was an employe of the Railroad Company (Baltimore & Ohio R. R. Co., defendant in error)."

Again on page 94 this court says:

> "We are of the opinion that Congress used the words employe and employed in the statute in their natural sense and intended to describe the conventional relation of employer and employe. It is well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include *such persons* among those to whom the Railroad Company was to be liable under the Act.
>
> We conclude that the plaintiff in error was not an

employe of the defendant company within the meaning of the Employers' Liability Act and that the judgment must be affirmed."

We are unable to distinguish the *Robinson* case from the one here. Robinson was an employe of the Pullman Company, not of the B. & O.; plaintiff was an employe of the C., B. & Q., not of defendant. By a written agreement Robinson released his employer, the Pullman Company, and the B. & O. By having made his relief contract, by having accepted his benefits and by operation of law, plaintiff released the C., B. & Q. and the C. & A. Congress when it passed this act as well knew that the tracks of railroad companies were used by the employes of other Companies, as it knew that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with the situation, that employes of one railroad company might work on or over the tracks of other companies, did not use any appropriate expression which could be taken to indicate a purpose to include persons not employes of the railroad company. Congress not having attempted to impose such liability upon the railroad companies, did not attempt to prohibit any contract, rule, regulation or device in evasion of it.

There was in this case a valid release of the C., B. & Q., because Section 5 only invalidated the release to the extent that it released the C., B. & Q. from the liability created by the Act. The section left valid the release in so far as it released anyone else from any other liability.

V.

ANSWER TO ARGUMENT OF PLAINTIFF.

The "statement" of plaintiff in support of his motion to dismiss is incorrect in some particulars. It is not a fact that the C., B. & Q. and certain associated railroad companies maintained a relief department known as the Burlington Relief Department. The revised regulations of the Relief Department of that Railroad Company recite:

> "1. The Relief Department is a department of the Company's service in the executive charge of a superintendent," etc. (Trans., 359.)

Article 7 recites:

> "Should any other corporation or corporations associated in interest with this Company adopt or have adopted regulations establishing a relief department or relief departments similar to the one hereby established, this Company may associate itself with such corporation or corporations in the administration of its and their relief departments when so authorized by the respective boards of directors of this and said corporation or corporations." (Trans., 383.)

In other words, the C., B. & Q. R. R. Co., maintained its own relief department. Other railroads maintained their relief departments. Since 1902 the only companies whose relief departments were affiliated were the Chicago, Burlington & Quincy Railway Company and the Chicago, Burlington & Quincy Railroad Company. (Trans., 432.) Their relief departments were not separate corporations. (Trans., 432.)

Plaintiff's statement contains the contention *he* made, in the trial court, as to how Section 5 of the Federal Employers' Liability Act should be construed. It does not state the contention defendant made there in that re-

gard. He says this court's jurisdiction is invoked principally upon the ground that the state court sustained his contention. It is not. It is invoked because defendant's contentions were denied.

Although counsel in his argument says, "No action can be prosecuted under the Act except actions between employer and employe," on page 5 of his "statement," he says:

> "It will be observed that the declaration states one complete cause of action at common law and that in addition it contains allegations that the parties were engaged in interstate commerce sufficiently to bring the case within the Employers' Liability Act, if that is applicable to such case."

Having conceded that the Act is inapplicable to an action not between employer and employe, he necessarily concedes its complete inapplicability to this case. No allegation as to interstate commerce affecting plaintiff, defendant, or the C., B. & Q., could have made it applicable in this case. No law except the common law controls the liability of defendant to plaintiff for personal injuries. The original declaration and additional counts herein could properly consist of nothing but strictly common law counts.

His statement that plaintiff's right of recovery was submitted to the jury strictly as a common law question is incorrect. At common law, irrespective of Section 5 of the Federal Employers' Liability Act, defendant was entitled to credit on plaintiff's damages for the amount paid by the C., B. & Q. The trial court refused to give defendant's instructions 29, 30 and 31, not because they were not proper under the common law, but because it construed Section 5 of the Act as to make the law stated therein inapplicable.

Counsel's statement that the evidence showed that the

C., B. & Q.'s employes contributed 85 per cent. of
moneys paid plaintiff in benefits and that the associa
railroad companies contributed but 15 per cent. of s
moneys is incorrect. We have so contended in the st
court and the Supreme Court. Whether the *remitti*
confessed was for a proper amount does not presen
federal question. We will, therefore, not take the sp
to prove its incorrectness.

Later on in his argument he seems to admit that
question presented is federal in character, but say
was not especially set up or claimed at the trial. He
says it "is too unsubstantial and frivolous to furnis
basis for invoking the jurisdiction of this court" (p.
In the light of the *Robinson* decision and the dissent
opinion in the State Supreme Court herein, the quest
seems most substantial and serious.

In *Seaboard Air Line Ry.* v. *Padgett,* 236 U. S.,
this court held that a contention of plaintiff in er
could not be said to be frivolous when its solution
by no means free from difficulty and when such diffic
was manifested by a division of opinion which arose
the subject in the court below.

Counsel also contends (page 16) that the real quest
in this case was as to the interpretation and applicat
of the common law rule. The trial court and review
courts were never in doubt as to what the common
rule was, relating to release of one joint *tort fea*
They all refused to apply the common law to this c
because of the construction they gave to Section 5.
verdict and judgment squarely turned on the consti
tion given that section.

Counsel's whole argument proceeds upon the the
that Section 5 of the Act invalidated the contract of
lease in question *entirely.* He admits that he clai

"That Section 5 invalidated the release in question" (p. 3) "and that as Sec. 5 of that Act invalidated the contract of release in question, that there was therefore no valid release and satisfaction to the C. B. & Q. and hence none to the defendant" (p. 9). His proposition is "that as the contract was void as between plaintiff and the C. B. & Q., it was also necessarily (p. 13) void as to the C. & A." (p. 12). He further says that "the contract was declared void by the statute" (p. 13). Later, however, he admits that the section by its express terms only declares such contracts void to the extent that they seek to release the carrier from any liability created by the Act. (pp. 13, 14). We claim that it only invalidated the release to a certain extent, viz., to the extent that it released the C. B. & Q. R. R. from a liability created by the Act. Plaintiff contends it entirely invalidated the release. The section expressly provides to what "extent" the contract "shall be void." To claim that the contract is entirely invalidated is to deny the words "shall to that extent be void" any force or effect whatsoever. To claim that the word "that" before the word "extent" refers to "the purpose or extent which shall be to enable any common carrier to exempt itself from any liability *created by this act*" seems the only consistent construction possible. Congress was unconcerned with the purpose, intent or effect of any contract enabling *defendant* to exempt itself from a liability, not created by the act.

In support of his argument he first contends that "the rights and obligations of plaintiff and the C. B. & Q. in respect to each other were governed solely by this Act" (p. 11). This statement is incorrect. Many phases of their relations were not controlled by that Act. They were only controlled to the extent that plaintiff sought to establish a liability against the C. B. & Q. thereunder

for personal injuries. In support of his theory he cites the case of *P. B. & W. R. Co.* v. *Schubert,* 224 U. S., 603. In that case the employe sued his employer under the Federal Employers' Liability Act and he later pleaded that the former had accepted the benefits of its relief department. This court held Congress had power to enforce the regulations provided by that section. It did not decide the question presented here. That this court did not interpret the section to mean that such contracts were invalid for all purposes appears from its opinion. On page 612 it says:

> "That is the liability which the act defines and which this action is brought to enforce. It is to defeat *that liability* for the damages sustained by Shubert which otherwise the company would *be bound under the statute* to pay, that it relies upon his contract of membership in the relief fund and upon the regulation which was a part of it. But for the stipulation in that contract, the company must pay, and if the stipulation be upheld the company is discharged from liability. The conclusion cannot be escaped that such an agreement is one for immunity *in the described event* and *as such* it falls under the condemnation of the statute."

Later the court says on page 613:

> "The words 'the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act' do not refer simply to an actual intent of the parties to circumvent the statute. The 'purpose or intent' of the contracts and regulations within the meaning of the section is to be found in their necessary operation and effect *in defeating the liability which the statute was designed to enforce.* Only by such general application could the statute accomplish the object which it is plain that Congress had in view."

In other words the contract is invalid in so far as its necessary operation and effect is to defeat the liability, which the statute was designed to enforce.

There is nothing in the opinion which says it is invalid in other respects. Plaintiff's right to enforce his claim against his employer, the C., B. & Q., will not be modified, if our construction is approved.

The other cases cited by counsel are those between employe and employer and involve the enforcement of a right or defense under either the Federal Employers Liability Act or a state act containing a provision similar to Section 5. They all hold the contracts invalid to the extent that they effect the release of the defendants from liabilities created by those acts.

His citation from *McMullen* v. *Hoffman,* 174 U. S., 654, is not in point. The contract in that case, made between contractors, by which both were to bid for public work and divide the profits if the work was let to either of them, was illegal under the common law.

His next contention that defendant's rights under the common law "could in no event be superior to the rights of the C., B. & Q." is based upon the premises first, that defendant's rights are derived solely through and from the C. B. & Q. and secondly that the release was entirely void as to the C. B. & Q. Defendant's rights resulted from its being a joint *tort feasor* with the C. B. & Q., and its having been given a release valid for all purposes, except for the purposes of exempting itself from a liability created by the Act.

His next contention is that there is nothing in the wording or purpose of Section 5 to support the claim that it invalidates such contracts only as between employer and employed. The title is, "An Act relating to the liability of common carriers by railroad to their employees in certain cases." The entire Act, relates only to employer and employe. There are these words "shall to that extent be void," viz., "to exempt *itself* from any

liability created by this Act." He next says "it would require the court to read something into Section 5 which is not there to warrant it in construing the section as invalidating such contracts as to one particular class of persons and leaving them valid as to another class." To warrant his construction that the contract is invalidated for all purposes, not only would something have to be read into the section, but the words "shall to that extent be void" and "to exempt itself from any liability created by this Act" would have to be disregarded. In lieu thereof there would have to be inserted words similar to "any liability whatsoever."

We concede, as counsel says, that it was the purpose of Section 5 to prevent the employer from escaping the consequences of *his* negligence. The reasons prompting such legislation would not necessarily be the same as those warranting a law preventing the employer's joint *tort feasor* from escaping the consequences of his negligence. Congress has not considered the latter field.

We do not see how it can be said that:

> "It is absurd to suppose that Congress intended to invalidate such contracts as to the employer who had contributed something towards the payment of benefits to the injured party, but intended that they should remain valid as to the employer's joint *tort feasor,*"

when Congress has not attempted to legislate in any field except for personal injuries occurring in interstate commerce, caused to the employe by the negligence of the employer.

Counsel also argues (p. 15) that the word "action" in the proviso refers merely to the matter of set-off. This is clearly untenable. The word action refers to the proceedings brought against the employer to establish a liability created by the act. The set-off would be claimed by the employer; he would not institute the action.

Counsel's argument that the particular right under the Federal Statute which was denied was not especially set up or claimed, is based entirely upon two facts, namely: that in refused instructions 29, 30 and 31, nor in the exceptions taken to their refusal, there was nothing to indicate the theory upon which they were requested, or the reason for the exceptions being taken to their refusal. In Illinois practice, it is not necessary for a party to state his specific reasons for excepting to the refusal or the giving of an instruction. We do not understand that a federal question is not specially set up or claimed and saved unless the instructions in themselves refer to the statute under which the right was denied. If the giving or refusal of them results from the misconstruction or misapplication of a particular federal statute, the claim is specially set up and denied. Had not the trial court denied the construction, asserted by defendant, of Section 5, it would have given these refused common law instructions.

Counsel says that instruction 29 was rightfully refused because it assumed that the C. B. & Q. and defendant were joint *tort feasors*. The Supreme Court of Illinois so found. He also says it was properly refused because it submits the question as to whether plaintiff accepted money from the C. B. & Q. The checks show that the Relief Department of that company paid him his benefits. The Relief Department was not an organization formed by a number of railroad companies. It was a department of the C. B. & Q. He says it wrongfully submitted to the jury, the fact, as to whether plaintiff accepted money as damages for the injuries he sustained. The evidence shows that plaintiff not only accepted the money as benefits, but under his contract accepted them in payment for damages for the injuries that he sus-

tained. This instruction, and instructions 31 and 32, were refused solely because of the construction given Section 5 by the trial court. The peremptory instruction at the close of all the evidence was denied for the same reason. This Federal question was raised by the stipulation; the long argument in chambers; the violation of the stipulation, etc. The rulings having been made after full arguments had been heard, it would have been futile for defendant to have embodied in each of the refused instructions his asserted claim. The claim had been fully made and denied. If the instructions included reference to Section 5 they would say "because Section 5 had no application." Courts do not give reasons for their statements of law to the jury.

Counsel for plaintiff, although he confessed the *remittitur* in the Appellate Court, which is supposed to have cured the error committed by the trial court in giving instruction 9, still contends it was properly given. His claim is that Section 5 was applicable to invalidate entirely the release, but was not applicable to entitle defendant to any credit for the amount paid by the C. B. & Q. Even if the section were applicable and entirely invalidated the release, defendant, *under the common law,* was entitled to credit for the amount paid by its joint *tort feasor* in part satisfaction of plaintiff's claim. The most that plaintiff could have asked, if Section 5 were applicable, was that credit only for the amount of the benefits contributed by the C. B. & Q. should be allowed. The trial court, however, so construed Section 5 as to deny defendant any of this right of set-off at common law.

It is further argued that the giving of plaintiff's instruction number 9, defendant's exceptions thereto and the errors assigned thereon, present no Federal ques-

tion; that it was properly given because Section 5 not only invalidates the release; but expressly provides that the carrier contributing to the Relief Department alone is entitled to a set-off. We have contended at all times that Section 5, properly construed, is not applicable, that the common law controlled as between plaintiff and defendant, that under the common law the acceptance of benefits constituted a complete release of the defendant, a joint *tort feasor;* that if their acceptance did not constitute a complete release, *at least* defendant, one *tort feasor,* was entitled to a credit for whatever amount another joint *tort feasor* (C. B. & Q.) had contributed towards the satisfaction of plaintiff's claim. The instruction was given solely because the court denied defendant's construction of Section 5.

Lastly, it is argued that the stipulation and its breach does not constitute a Federal question. It at least proves that defendant at all times claimed a certain construction of Section 5, which it was denied. Defendant was surely deprived of a substantial right when plaintiff was permitted to avoid his stipulation.

Counsel in conclusion suggests that the only question involved is whether the admission of the interstate commerce evidence in rebuttal was error under the pleadings. Its admissibility did not turn on the pleadings. The authorities cited by counsel are, therefore, not in point. Whether plaintiff should have been permitted to prove he was engaged in interstate commerce depended upon whether, when such proof was made, Section 5 would be applicable, and invalidate the release interposed as a defense. The right to submit such proof turned on the construction of Section 5. The trial court erroneously construed Section 5, wrongfully denied the correct construction for which defendant contended, and

admitted the evidence. In so doing it did not decide a question of local law. It decided a Federal question. Reversing the judgment of the State Supreme Court will deny a double recovery by plaintiff and he may prosecute his cause under the Federal Act against his employer.

We respectfully ask that the motion of plaintiff to dismiss be denied.

Respectfully submitted,

Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.
FILED
NOV 8 1915
JAMES D. MAHER

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

No. 375

THE CHICAGO AND ALTON RAILROAD COMPANY,
Plaintiff in Error,
vs.
JOSEPH M. WAGNER,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

SILAS H. STRAWN,
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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT.

MAY IT PLEASE THE COURT:

The Federal question involved is whether Section 5 of the Employers' Liability Act of April 22, 1908, C. 149, 35 Stat. 65, which provides that "Any contract * * * the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void," is ap-

plicable in this suit which is brought under the common law of Illinois by defendant in error (hereinafter called plaintiff), *an employe of the Chicago, Burlington and Quincy Railroad Company* (hereinafter called C. B. & Q.) against plaintiff in error (hereinafter called defendant) for injuries resulting to him, by reason of the negligence of defendant, and if applicable, whether that section invalidates a release resulting to defendant by plaintiff's acceptance of relief benefits from the C. B. & Q., defendant's joint tort feasor.

This Federal question was raised at the trial by defendant's exception to the overruling of its objection to the admissibility of certain evidence offered by plaintiff in rebuttal, showing that the cars which plaintiff and the C. B. & Q. were engaged in transporting over defendant's tracks at the time plaintiff was injured, contained interstate shipments. (Trans., 489-503.) Prior thereto plaintiff had proven, that, while in the employ of the C. B. & Q. he had been injured while operating a train of cars over the tracks of defendant, in consequence of the joint or concurrent negligence of the defendant and the C. B. & Q. and defendant in defense had proven plaintiff's membership in the relief department of the C. B. & Q., his acceptance of benefits therefrom in payment for his injuries, and the terms of the relief contract providing that the acceptance of such benefits should operate as a release and satisfaction to the C. B. & Q.

The Federal question was also raised at various other times, as stated under Point III of our brief on the motion to dismiss (pp. 13-20).

The trial, Appellate and Supreme Courts of Illinois hold that Section 5 is applicable; that it invalidates the release as to the C. B. & Q., and that the defendant, its joint tort feasor, therefore, is not released.

ERRORS RELIED UPON.

1. The Supreme Court of Illinois erred in its construction and application of Section 5 of the Employers' Liability Act. (Assignment of Errors, III to XV, inclusive; Tr., 617-620.)

2. The trial court erred in admitting over defendant's objection, in rebuttal, evidence to prove that at the time plaintiff was injured, the C. B. & Q. and he were engaged in interstate commerce. (Tr., 494-503.) The Supreme Court of Illinois also erred in refusing to reverse the judgments of the Appellate and the trial court because of such error. (Assignment of Errors, XVI; Tr., 620.)

3. The trial court erred in erroneously giving to the jury the following instruction at the request of plaintiff:

> "9. If, under the evidence and instructions of the court, the jury find defendant guilty, and that plaintiff is entitled to damages, then, in the assessment of such damages, you should not credit the defendant with any sum which the Chicago, Burlington & Quincy Railroad Relief Department paid to the plaintiff, or paid to any doctor, or other person, for or on account of the plaintiff." (Tr., 558, Assignment of Errors, XVII; Tr., 620.)

and the Supreme Court of Illinois erred in refusing to reverse the judgment, because of the error committed by the trial court in giving this instruction.

4. The trial court erred in erroneously refusing to give to the jury each and all of the following instructions requested by defendant:

> "29. You are further instructed that if you find from the evidence in this case that the plaintiff accepted a sum of money as damages for injuries that he sustained at the time and place charged in the declaration, from the Chicago, Burlington & Quincy

Railroad Company, and that in consideration of the payment of said money for such damages the plaintiff accepted said money in full payment and release of all claims that he had or might have against the said Chicago, Burlington & Quincy Railroad Company for damages for said injuries, then you are instructed that as a matter of law, receiving said payment in full satisfaction and release of his claims that he had or might have against the said Chicago, Burlington & Quincy Railroad Company is a bar to his action against the defendant, the Chicago and Alton Railroad Company, and if you find that he accepted a payment of money from the Chicago, Burlington & Quincy Railroad Company as aforesaid and released them as aforesaid, then you are instructed the acceptance of such payment is a bar to this action, and under such state of proof you must find the defendant not guilty."

"30. You are further instructed as a matter of law, that where a person is injured and more than one person or corporation is jointly or severally liable to such person for damages for his injuries, and one of said persons or corporations pays to the injured person a sum of money in full satisfaction and release of his damages for said injuries, then you are instructed that such injured person cannot recover damages for the same injury; in other words, where the plaintiff in the case has received payment in full from one of the joint—feasors and released the one paying the money from all liability for such injury in full settlement of his damages for such injury, he is barred from recovering damages against any other person or company liable for the same injury."

"31. The court instructs the jury that where an injury is caused by the acts of two or more persons, such persons causing such injury are in law called joint tort feasors. The court also instructs the jury that if the person receiving such injuries accepts in payment of his injuries anything of value from one of said so-called tort feasors, such acceptance on his part is a release of all liability on the part of the other of the so-called tort feasors." (Tr., 563, 564.)

and the Supreme Court of Illinois erred in refusing to reverse the judgments of the Appellate Court and trial court because of the errors committed by the trial court in refusing to give said instructions. (Assignment of Errors XVIII; Tr., 620-621.)

5. The trial court erred in denying defendant's motion for a directed verdict at the close of all the evidence (Tr., 512, 513), and in denying defendant's motion for a new trial (Tr., 567), and the Supreme Court erred in refusing to reverse the judgments of the Appellate Court and trial court because of said errors. (Assignment of Errors, XXI, XXVI, XXVII; Tr., 622-623.)

6. The Supreme Court of Illinois erred in affirming, the judgment of the Appellate Court. (Assignment of Errors, I, II, XXVIII; Tr., 617, 622.)

BRIEF.

I.

SECTION 5 OF THE EMPLOYERS' LIABILITY ACT IS INAPPLICABLE IN THIS CASE BECAUSE PLAINTIFF WAS NOT AN EMPLOYE OF DEFENDANT.

Robinson v. *Baltimore & Ohio R. R. Co.*, 237 U. S., 84.

Missouri, Kansas & Texas Ry. Co. v. *West*, 232 U. S., 682.

II.

SECTION 5 OF THE EMPLOYERS' LIABILITY ACT DOES NOT INVALIDATE A RELEASE, RESULTANT TO A JOINT TORT FEASOR FROM THE ACCEPTANCE OF RELIEF BENEFITS UNDER A RELIEF CONTRACT.

Robinson v. *Baltimore & Ohio R. R. Co.*, 237 U. S., 84.

III.

THE MISAPPLICATION OF SECTION 5 OF THE EMPLOYERS' LIABILITY ACT AND THE DENIAL OF PLAINTIFF'S ASSERTED CONSTRUCTION THEREOF, PRESENT A FEDERAL QUESTION GIVING THIS COURT JURISDICTION.

Seaboard Air Line Ry. v. *Horton*, 233 U. S., 492, 499.

St. Louis, Iron Mountain & Southern Ry. v. *McWhirter*, 229 U. S., 265.

St. Louis & Iron Mountain Ry. v. *Taylor*, 210 U. S., 281, 292.

Seaboard Air Line Ry. v. *Tilghman*, 237 U. S., 487.

Toledo, St. Louis & Western R. R. Co. v. *Slavin*, 236 U. S., 454.
Seaboard Air Line Ry. v. *Padgett*, 236 U. S., 668.
Southern Ry. Co. v. *Crockett*, 234 U. S., 725.
M. K. & T. Ry. Co. v. *West*, 232 U. S., 682.
Nutt v. *Knut*, 200 U. S., 12, 19.
McCormick v. *Market Bank*, 165 U. S., 538.
El Paso Northeastern Ry. v. *Gutierrez*, 215 U. S., 87.
Straus v. *American Publishers' Assn.*, 231 U. S., 22.
Houston & Texas Central Rd. Co. v. *Texas*, 177 U. S., 66, 77.
Buel v. *Van Ness*, 8 Wheat., 311, 321.
Mathews v. *Zane*, 4 Cranch., 381.

IV.

WHERE THE HIGHEST COURT OF THE STATE ASSUMES THAT THE RECORD SUFFICIENTLY PRESENTS FOR ITS DECISION, A QUESTION OF FEDERAL RIGHT, THIS COURT WILL TAKE JURISDICTION.

Mallinckrodt Chemical Works v. *State of Missouri*, 238 U. S., 41.
Chambers v. *Baltimore & Ohio R. R. Co.*, 207 U. S., 142, 148.
San Jose Land & Water Co. v. *San Jose Ranch Co.*, 189 U. S., 177.
Haire v. *Rice*, 204 U. S., 291.
Home for Incurables v. *City of New York*, 187 U. S., 157.
Missouri, Kansas & Texas Ry. Co. v. *Elliott*, 184 U. S., 530.

ARGUMENT.

In our brief on the motion to dismiss (Points IV and V, pp. 22-40) it was necessary to argue the merits of the Federal question presented. To avoid repetition we ask this court to refer to our argument there in connection with the following:

We contend that Section 5 is inapplicable because plaintiff was not an employe of defendant and does not sue defendant on any liability created by the Act. This court held in *Robinson* v. *Balt. & Ohio R. R. Co.*, 237 U. S., 84, that the application of Section 5 "depends upon the plaintiff's employment. For the 'liability created' by the Act is a liability to the 'employes' of the carrier and not to others," and "the plaintiff (a Pullman porter) was not entitled to the provision unless he was 'employed' by the railroad company (defendant) within the meaning of the Act." (Parentheses ours.)

Plaintiff here was not employed by defendant. He was employed by the C. B. & Q. This court also holds in the *Robinson* case, page 94:

> "That Congress used the words 'employe' and 'employer' in the statute in their natural sense and intended to describe the conventional relation of employer and employe. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress familiar with this situation did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act."

Section 5 is inapplicable because its application would be inequitable. Plaintiff herein sues defendant under the common law of Illinois. He had no other cause of action against defendant. It offers a defense valid and

sufficient under that common law, viz., a release resulting from the satisfaction made by, and the release of, the C. B. & Q., a joint tort feasor.

(In *Eckman* v. *C. B. & Q.*, 169 Ill., 312, the acceptance of the C. B. & Q. relief benefits by Eckman, after receiving an injury, was held to operate as a satisfaction and bar to a subsequent suit for damages. In *Walner* v. *Chicago Traction Company*, 245 Ill., 148, 151, the Supreme Court of Illinois held that a release of one of several joint tort feasors releases all, and that an accord and satisfaction by one joint tort feasor has the same effect as to all.)

To invalidate the defense herein, plaintiff offers no facts, which, under any rule of the common law of Illinois, invalidates the proven release, but is permitted to prove facts, viz., the engagement of the C. B. & Q. and himself in interstate commerce at the time he was injured, so as to have applied a Federal law which controls only as to some of the relations between him and his employer, the C. B. & Q., but which in no way controls any phase of his relations with, or rights against, defendant. He is permitted the application of this Federal law by the state courts, because such law is said to have superseded the common law of Illinois. (Tr., 590.) The Act has superseded a certain part of the law of Illinois, namely, the common law which formerly controlled, between a railroad employe and his employer, as to their respective rights and liabilities by giving a *new* and *exclusive* right of action by the employe against his immediate *employer*, when the employe is injured while both are engaged in interstate commerce. The Act has not superseded the common law which controls between the employe and any other person, not his employer, for injuries resulting to the employe from the acts of such person. The Federal law in question has not entered the lat-

ter field. Plaintiff, therefore, has been given the benefit of the Federal law which does not modify his relations with, or rights against this defendant, as provided by the common law. The plaintiff's entire right of action against this defendant, being based exclusively upon the common law, he should be restricted to the common law, and defendant should be permitted its common law defenses.

The dissenting opinion of the Supreme Court of Illinois summarizes our contentions, when it says (Tr., 593):

> "The facts proved by the defendant were sufficient to establish under the law of this state a satisfaction by the Burlington Company of the plaintiff's injury and damages, and the evidence admitted in rebuttal was for the purpose of destroying that defense by means of the Federal Employers' Liability Act, which gave no cause of action to the plaintiff and under which the suit was not and could not have been brought. Congress has supreme control over the subject of commerce between the several states and no one disputes the proposition that whenever suit is brought and facts are averred which constitute a cause of action under an Act of Congress relating to that subject, the act supersedes all legislation over the same subject by the states, but Congress cannot and has not attempted to determine what shall be the policy of a state or what its laws shall be. There is no act of Congress which would give any right of action in favor of the plaintiff against the defendant, whether engaged in interstate commerce or not; Congress has not legislated on that subject at all. In an action brought under the state law, the defendant is as much entitled to the benefit of the law as the plaintiff. If the law of this state was good for the purpose of recovery it was equally good to establish a defense against the cause of action existing under the same law. To say that a law regulating the rights and duties of parties and giving a right of action for a violation of such rights and duties and declaring what shall be a release of such right of action is available for sustaining the action

and not available for a defense, is to destroy that equality of right which the law is intended to and must preserve. While the Federal statute supersedes the law of the state as to employer and employe when engaged in interstate commerce, it only supersedes such law where allegations constituting a cause of action under it are made and proved. In the case of *Mondou* v. *New York, New Haven & Hartford R. R. Co.*, 223 U. S., 1, the opinion was delivered in four cases and the right of action in each was based solely on the act of Congress. The case of *Michigan Central R. R. Co.* v. *Freeland*, 227 U. S., 59, presented exactly the same condition. The proviso to Section 5 of the Federal statute allowing the employer to set off any sum it has contributed to a relief benefit or indemnity fund is expressly limited to actions brought under or by virtue of the provisions of the act, and neither that proviso nor anything contained in the act relates in any way to an action brought under a state law. If the plaintiff had sued his employer, the Burlington Company, and alleged that the injury occurred while the engines and cars were engaged in interstate commerce, the Federal statute would apply and the employer could only set off against the damages the sum contributed to the relief fund, but if the plaintiff had brought this suit against the Burlington Company, the evidence of membership in the relief department and the receipt of benefits would have established a satisfaction for the injury and have been a complete defense. We do not agree with the majority that a plaintiff may bring an action under the law of one jurisdiction and prevent a valid defense under that law by invoking the law of another and different jurisdiction."

Section 5 does not invalidate the relief benefit release as to anyone except the defending employer. Prior to the passage of the Act, under the common law of Illinois, the "relief benefit" release proven in this case had at least two legal attributes. It was operative as a release of a liability of a common carrier by railroad to its employe for injuries received by the employe result-

ing from the employer's negligence while both were engaged in interstate commerce or while neither was engaged in interstate commerce. It was also operative as a release of a joint tort feasor when his negligence concurred with that of the employer. By Section 5 Congress, by direct, positive and limited language, has only taken away the first attribute of that release and then only when the accident happened while employer and employe were engaged in interstate commerce. It has deprived the release of its capacity to "exempt" the employer, to whom the release is given, from any liability created by the Act, namely, any liability to its employe for any injuries resulting to him from certain kinds of negligence when both are engaged in interstate commerce. Section 5 of the Act has not deprived the release of any of its other legal attributes and capacities, or its capacity to operate as a release of a joint tort feasor.

In our brief, on the motion to dismiss, (Points I. II and III (pp. 4-22) we have discussed fully the law and evidence in this case giving this court jurisdiction of the Federal question presented. We ask the court to refer to our argument there in disposing of that question.

Conclusion.

We respectfully submit that Section 5 of the Employers' Liability Act has been erroneously construed and applied to this suit because plaintiff is not an employe of defendant and the suit does not seek to recover on a liability created by the Act. We also submit that the release resultant from plaintiff's acceptance, of the C. B. & Q. relief benefits, is not invalidated by Section 5 to the extent that their acceptance does not operate as a release of defendant, a joint tort feasor.

We respectfully ask that the motion of plaintiff to dismiss be denied and that the judgment of the Supreme Court of the State of Illinois be reversed.

Respectfully submitted,

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EDWARD W. EVERETT,
J. SIDNEY CONDIT,
Attorneys for Plaintiff in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

No. 375

THE CHICAGO AND ALTON RAILROAD COMPANY,
Plaintiff in Error,

vs.

JOSEPH M. WAGNER,
Defendant in Error.

Writ of Error to the Supreme Court of the State of Illinois.

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

As in our former brief, we shall herein refer to Wagner as plaintiff and to the Railroad Company as defendant, and to the other railroad company by its initials, viz., the C. B. & Q. For sake of brevity we shall also refer to the Federal Employers' Liability Act as the "Act."

A statement of the case is contained in our printed motion to dismiss and the argument in support thereof (pp. 1-10).

In defendant's counsel's last brief, and under the heading, "Errors Relied Upon," they specify the alleged error of the trial court in admitting evidence that at the time plaintiff was injured he and the C. B. & Q. were engaged in interstate commerce, *but they do not refer to this alleged error in their brief or argument.*

In their argument, however, they say:

"In our brief on the motion to dismiss (Points IV and V, pp. 22-40) it was necessary to argue the merits of the Federal question presented. To avoid repetition we ask this court to refer to our argument there in connection with the following."

This leaves it somewhat uncertain as to whether they ask this court to reverse the judgment on the ground of the alleged error in admitting this testimony. We do not think they so intend, for in their prior brief, thus mentioned, they merely refer to the admission of this evidence in support of the claim that they *especially set up and claimed* the alleged Federal question, as to the application, or non-application, of Sec. 5.

Indeed, that their reference to the admission of this testimony was only for the purpose of showing that they especially set up and claimed their alleged Federal right is shown by statements in their original brief (p. 3) that:

"Except as to plaintiff's motion to dismiss for want of jurisdiction, because the Federal question was not properly saved, *the proper construction of Section 5 is the only question for decision here.*"

See, also, page 22 of their former brief.

Hence, notwithstanding the error assigned in this respect, we do not think counsel contend that the

judgment should be reversed on the ground that the trial court erred in the admission of the evidence mentioned, and, therefore, we do not think the court is called upon to consider that matter, except in so far as it may indicate that the question as to the application of Sec. 5 was, or was not, especially set up and claimed, etc.

We discussed the question as to the admissibility of this evidence, in so far as it affects the question of jurisdiction, in our former argument (pp. 26-34). We shall, therefore, assume, without further discussion, that so far as the merits of the case are concerned the question of the admission of this evidence is not involved.

Under the heading, "Errors Relied Upon," counsel also set out the assignments of error to the effect that the trial court erred in giving one of plaintiff's instructions, and in refusing three of defendant's instructions, *but they do not mention these alleged errors in their brief or argument.*

The giving and refusing of these instructions were only referred to in defendant's original brief or argument, in support of the contention that the alleged Federal right *was especially set up and claimed.*

We shall, therefore, assume that so far as the merits of the case are concerned the question as to the propriety, or impropriety, of giving or refusing these instructions is not involved.

The giving of plaintiff's instruction (Brief, pp. 21-26) and the refusal of defendant's instructions was referred to in our former brief (pp. 18-26).

In counsel's original brief, and in support of their

claim that the alleged Federal right *was especially set up, claimed and denied,* etc., they call attention to a statement made by plaintiff's attorney *during the trial,* in support of his objection to the admission of certain testimony, and based upon this and other similar statements they say:

"Plaintiff's counsel knew, *before trial, and at the time he made the agreement,* that defendant relied upon the release to the C. B. & Q. as a defense." (Defts. Orig. Brf., p. 15.)

The quotation referred to shows that plaintiff's counsel knew of the release, and that defendant intended to rely upon it, *at the time he made the remarks quoted,* but the remarks do not indicate that he knew, *before the trial, or at the time the alleged agreement was made,* of the release, or that defendant intended to rely upon it as a defense.

This matter, however, only goes to the question as to whether the alleged Federal right was especially set up, claimed and denied, etc.

As we understand it, the *sole* question upon the merits is as to whether the State courts erred in holding that the release in question was void, as between plaintiff and the C. B. & Q., and that being void as between them, it could not operate as a valid release to defendant.

BRIEF.

I.

THE STATE COURT'S HOLDING THAT PLAINTIFF'S ACCEPTANCE OF BENEFITS FROM THE BURLINGTON RELIEF DEPARTMENT DID NOT OPERATE AS A RELEASE, OR SATISFACTION, TO DEFENDANT, DOES NOT PRESENT A FEDERAL QUESTION.

It is clear that the release in question was void under Sec. 5, as between plaintiff and the C. B. & Q., and the real question is as to whether, being void as between the parties to it, it could operate as a valid release to defendant.

This, we think, is a common law question, which depends upon the application, or non-application, of the common law rule, that a release to one joint tort feasor operates as a release to all joint tort feasors, and hence, is not a Federal question.

II.

ASSUMING, FOR SAKE OF ARGUMENT, THAT THE QUESTION IS A FEDERAL QUESTION, AND THAT IT WAS ESPECIALLY SET UP OR CLAIMED, ETC., WE DENY THAT IT WAS ERRONEOUSLY DECIDED.

The release was void as between the parties to it, and, consequently, it could not operate as a valid release to defendant.

McMullen v. *Hoffman*, 174 U. S., 654.
6 Ruling Case Law, Sec. 215, p. 819.

ARGUMENT.

I.

THE STATE COURT'S HOLDING THAT PLAINTIFF'S ACCEPTANCE OF BENEFITS FROM THE BURLINGTON RELIEF DEPARTMENT DID NOT OPERATE AS A RELEASE, OR SATISFACTION, TO DEFENDANT, DOES NOT PRESENT A FEDERAL QUESTION.

In our former argument, in support of our motion to dismiss the case for want of jurisdiction (pp. 16-21), we endeavored to show that the alleged Federal question upon which defendant relies was not especially set up, or claimed, and denied at the trial. We still think our contention in that respect is sound, but we do not care to add to what we have previously said upon that point.

In this connection, however, *we shall assume for sake of argument only,* that the alleged Federal question was especially set up, etc.; but we still insist that the question is not a Federal question. Our claim is, as it was in our original argument, that the real question in this regard is as to the application or non-application of the *common law rule,* that a release to one joint tort feasor operates as a release to all joint tort feasors, and is not as to the construction or application of Sec. 5 of the act in question.

There is and can be no serious question but that the contract of release was *void* as between plaintiff and the C. B. & Q., and it was, therefore, we think, a *common law question,* as to whether it

should, or should not be held to *operate* as a *valid* release and satisfaction to defendant.

The Federal Act does not touch this question, and defendant's counsel admit such to be the fact. They say:

"The release, if invalidated at all as to the C. B. & Q., was only invalidated to the extent that it prevented the C. B. & Q. from being released from the liability created by the act. It was not invalidated to the extent that it aided others in being released from their liability under the common law. *Congress didn't legislate on that subject.* * * * No federal law, however, controlling between plaintiff and defendant, a stranger, had superseded the common law governing their relations. * * * *Congress might have legislated in respect to the relations existing in this case between plaintiff and defendant. It has not done so.*" (Deft's Original Brief, 23.)

And again they say:

"To the extent that it released the party with whom it was made Congress has legislated; *to the extent that it released such parties joint tort feasor Congress has not legislated.*" (Deft's Original Brief, 25.)

Section 5 invalidates such contracts to the extent that they are intended to exempt the employer from any liability created by the Act; but it does not touch the question as to whether, if such a contract is invalid, as between the parties to it, it does or does not operate as a *valid* release, or satisfaction, to a third party.

If there is any question as to the invalidity of the release as between plaintiff and the C. B. & Q., that may be a federal question, but the question whether the release, if void as between the plaintiff and the

C. B. & Q., does or does not operate as a valid release to defendant, is not, we think, a federal question but is a question that depends upon the application or non-application of the common law rule referred to.

Again, unless Sec. 5 can be construed as only invalidating such releases as between employer and employee, and in actions prosecuted under the Act, *and in the sense that such releases shall be deemed valid as between the employer and employee in all other actions in which they may be brought in question,* then, we think, the question as to whether plaintiff had the right to rely upon the invalidity of the release *in this action* is a question of general or local law, and does not present a Federal question.

II.

ASSUMING FOR SAKE OF ARGUMENT THAT THE QUESTION IS A FEDERAL QUESTION, AND THAT IT WAS ESPECIALLY SET UP, OR CLAIMED, ETC., WE DENY THAT IT WAS ERRONEOUSLY DECIDED.

As defendant's defense is based entirely upon plaintiff's alleged release, or satisfaction, to the C., B. & Q., it may be helpful at the outset to ascertain the character of this alleged release or satisfaction.

The C., B. & Q., and another associated company, *not the defendant,* were parties to the Burlington Relief Department. (Tr., 432.) This department was an organization, or association, created for the purpose of establishing a relief fund, and some, not all, of the employees of the C., B. & Q., and its associated company, were members of the Relief Department.

The affairs of the Relief Department were governed by a Board of Directors and committees, and a president, secretary, and other officers, and by-laws, rules and regulations for the government of the department were established. (Tr., 381-383.) While the Relief Department is referred to as a department of the C., B. & Q.'s service, it is apparent that it was in fact a separate, voluntary relief association.

The employees made monthly contributions for the creation of the relief fund, from which *sick*, injury and death benefits were to be paid. These benefits were due and payable, under the employee's contract with the Relief Department, without reference to whether the employee's sickness, injury or death occurred through the negligence of the C., B. & Q., or anyone else, and without reference to whether it occurred while the employee was on or off duty. The employee's right to such benefits depended *solely* upon his being a member in good standing of the Relief Department, at the time of the sickness, injury or death. (Trans., 393-397.)

The evidence shows that the employees contributed about 85% and the railway companies but 15% to the fund from which the benefits were paid. In fact, the railway companies did not contribute even 15% of the moneys paid in benefits, for their chief contributions were in the nature of office space and services rendered to the Relief Department. The employee's contract with the Relief Department, however, provided that:

"The *acceptance* by the member of *benefits* for injury shall *operate* as a release and satisfaction of

all claims *against the company and all other companies associated therewith as aforesaid,* for damages arising from or growing out of such injury." (Tr., 399.)

Aside from this stipulation, the employee's contract with the Relief Department was an ordinary contract of insurance.

Plaintiff accepted the benefits due him from the Relief Department on account of his disability occasioned by his injuries. As plaintiff's right to receive and the Relief Department's obligation to pay such benefits were in no manner dependent upon whether the C., B. & Q., or anyone else, was guilty of a tort, or negligence, which resulted in plaintiff's injuries, it follows that *aside from the provision of the contract as above quoted, the ordinary legal effect* of such payments and acceptance of benefits would be to satisfy plaintiff's *claim under his contract of insurance,* and, consequently, such payments and acceptance of benefits *would not ordinarily* have the effect of releasing or satisfying his claim against the C., B. & Q., or anyone else, on account of its, or their tort or negligence, which resulted in his injuries. (Baldwin on Per. Inj. (2nd Ed.), Sec. 420, p. 520; 2 Shear. & Red. on Neg. (5th Ed.), Sec. 765, p. 1318; 1 Sedg. on Dam. (8th Ed.), Sec. 67, p. 89.)

Such payments by the Relief Department, and acceptance by plaintiff, *were given other than their ordinary legal effect,* solely by virtue of the provision of the contract above quoted, that is to say, under that provision of the contract they were made to *operate* as a release and satisfaction to the C., B. & Q., on account of its negligence or tort.

Aside from Section 5 of the act in question, under the Illinois authorities, such acceptance of benefits would *operate* as a release and satisfaction to the C., B. & Q. (*Eckman* v. *C., B. & Q. R.*, 169 Ill., 312.) It has never been held, however, in any case of which we are aware, that *because* such acceptance of benefits are *given other than their ordinary legal effect,* as between the employees and the companies associated in the Relief Department, that such acceptance of benefits should be *given other than their ordinary legal effect* as to strangers, that is to say, should *operate* as a release or satisfaction to a stranger to the contract or Relief Department.

Indeed, in the only cases we have been able to find, in which the question was involved, it was held that such acceptance of benefits, under such a contract, did not *operate* as a release, or satisfaction, to a stranger to the contract. (*Fitzgerald* v. *U. S. Y. Co.*, 89 Neb., 393; 131 N. W., 612; *Kitman* v. *C., B. & Q. Ry.*, 113 Minn., 350; 129 N. W. Rep., 844.)

It will thus be seen that aside from Sec. 5 of the act in question, defendant asks this court to go further in this case than any other court has ever gone, in such a case. While we regard counsel's claim in this respect very questionable, even aside from the effect of Sec. 5, nevertheless *we shall discuss this case upon the assumption that if the release in question was valid as between plaintiff and the C. B. & Q., it operated as a valid release to defendant.*

The Supreme Court of Illinois held in this case that:

"As between defendant in error and the Burlington Company the Federal Employers' Liability Act

clearly applied, and if, as the United States Supreme Court has repeatedly held, that law supersedes all state laws on the subject, then the release given by the defendant in error to the Burlington Company was not valid and would not have precluded recovery by him from that company. *If it was not valid so far as the Burlington Company was concerned, it was clearly invalid as to the plaintiff in error and constituted no defense to this action.*"

This court has repeatedly held that in a case of this kind it will only inquire "whether *plain error* was committed by the court below in any of the particulars complained of," and that if there is "nothing giving rise to a *clear conviction* on our part that error has resulted from the action of the courts below," the judgment will be affirmed. (*Chicago Junction Ry. Co.* v. *King*, 222 U. S., 222; *Seaboard Air Line* v. *Moore*, 228 U. S., 433; *Chicago, R. I. & Pac. Ry.* v. *Brown*, 229 U. S., 317; *Southern Ry. Co.* v. *Gadd*, 233 U. S., 577.)

For sake of brevity we shall hereinafter refer to plaintiff's acceptance of benefits under the contract merely as the "release."

The real questions involved are: First, was the release *void* as between plaintiff and the C., B. & Q.? and if it was: Second, Could it operate as a *valid* release to defendant?

First.

The State Supreme Court held that defendant and the C., B. & Q. were joint tort feasors, that is to say, that they were jointly liable on account of plaintiff's injuries, and this court will no doubt treat that finding as final. (*C., R. I. & P. Ry.* v. *Dowdall*, 229 U S., 113.)

It was not necessary to plaintiff's case that the C., B. & Q. should be held to be a joint tort feasor, but that holding is essential to defendant's defense, for it is plaintiff's alleged release of the C., B. & Q.'s liability as a joint tort feasor which it is claimed operated as a release to defendant.

The undisputed evidence shows that the C., B. & Q. was a common carrier by railroad and that plaintiff was in its employ as a conductor (Tr., 181-183), and that at the time of the accident, both plaintiff and the C., B. & Q. were engaged in interestate commerce, that is to say, they were operating a train of cars which were in transit from the Pacific to the Atlantic Coast. (Tr., 494-505, 185.)

Defendant's counsel concede that the relation of employer and employee existed between plaintiff and the C., B. & Q., and that they were engaged in interstate commerce at the time of the accident. (Deft's Original Brief, p. 2.) If, then, plaintiff and the C., B. & Q. were engaged in interstate commerce at the time of the accident, it follows that their respective rights, duties and obligations were fixed and regulated *solely and exclusively* by the act in question, for it has been repeatedly held that this act is *exclusive* in its operation in all cases to which it applies. (*Wabash R. R.* v. *Hayes*, 234 U. S., 89; *North Carolina R.* v. *Zachary*, 232 U. S., 591.)

It thus follows that the C., B. & Q.'s *only* liability to plaintiff, for or on account of its negligence, which joined or concurred with the negligence of defendant, in causing his injury, that is to say, its liability as defendant's joint tort feasor, *was created and existed solely and exclusively by virtue of the act in*

question; yet it is plain that under Sec. 5 of that act the release in question was not a valid release of that liability as between plaintiff and the C., E & Q.

Sec. 5 provides:

"That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself *from any liability created by this act,* shall to that extent *be void.*"

It has been expressly held that Sec. 5 invalidates the particular kind of a contract involved in this suit, and consequently, that the acceptance of benefits, under such a contract, does not operate as a valid release or satisfaction. (*P. B. & W. R. R. Co.* v. *Shubert,* 224 U. S., 603.) It seems clear that as the C., B. & Q.'s *only* liability to plaintiff as a joint tort feasor or otherwise, was created by the act in question, and as Sec. 5 of that act invalidates such a release of such liability, the release in question was *absolutely and unconditionally void* as between plaintiff and the C., B. & Q. And yet it is this release which was *void* as between the parties to it, that counsel claim *operated* as a *valid* release to defendant.

But counsel say:

"The release could not be *invalidated* even as between the employee and his employer *until a suit was brought by one against the other to establish a liability created by the act.*" (Deft's Original Brief, p. 23.)

This clearly would not be true in case such releases were declared invalid by any other ordinary statute, and we see nothing in Sec. 5 to sustain the contention. It certainly does not expressly provide

that such a contract shall be void *only in the event an employee sues his employer under the act or otherwise;* nor does it contain anything to that effect. Upon the contrary, it expressly provides that such contracts of release to the extent mentioned shall be void. It makes the validity of such contracts depend *solely* upon the question whether the contract is or is not intended to enable the carrier to exempt itself from *any liability created by the act.* Under the express terms of Sec. 5, and as between an employee and an employer, both being engaged in interstate commerce, the only condition necessary to the invalidity of such a contract is, that it was intended to exempt the employer from a liability created by the act. And in this case, it seems absurd to claim that as the contract in question did in fact seek to exempt the employer from a liability created by the act, that it should be deemed valid unless and until plaintiff should commence a suit under the act against the C., B. & Q.

If plaintiff had sued the C., B. & Q. to recover damages on account of its negligence, which contributed to his injury, and in such a suit it should be held that the contract in question was void, it would not be so held because, or on account of the commencement or prosecution of the suit, but would be so held because it was the kind of a contract which Sec. 5 invalidates, and if the contract was not invalid before the suit was commenced, it would not be rendered invalid by the commencement or prosecution of the suit. In such a suit the court would merely adjudicate and declare that the contract was invalid,

and this because it was invalid before the suit was commenced.

Counsel's contention in this regard seems to be based upon the use of the word "action" in the proviso of Sec. 5, but the word "action" is not used at all in the portion of the section which invalidates such contracts. The first part of Sec. 5 deals only with the questions of the validity of such contracts, whereas the proviso deals only with the matter of set-off, that is to say it provides in substance that in an action prosecuted under the act, and in which such a contract is held void as a release or satisfaction, that the carrier may nevertheless set-off in such action, any sum that it contributed to the fund out of which the injured employee's benefits were paid.

We think it clear that Sec. 5 did invalidate the release in question, as between plaintiff and the C., B. & Q., and that if plaintiff had sued the C., B. & Q. under the act, to recover damages on account of his injuries occasioned by the joint negligence of the C., B. & Q. and defendant, the release would not have been a bar to that suit; or if plaintiff had made the C., B. & Q. a party to this suit, and sought to recover from it under the act in question, and sought to recover against the defendant at common law, the alleged release would not have been a bar as to plaintiff's claim against the C., B. & Q.

Second.

If, then, the alleged release was *void*, as between plaintiff and the C., B. & Q., the next question is: Was it *valid* as between plaintiff and defendant, the C., B. & Q.'s joint tort feasor?

In *McMullen* v. *Hoffman*, 174 U. S., 654, this Court said:

"The authorities from the earliest time to the present unanimously hold that no court *will lend its assistance in any way towards carrying out the terms of an illegal contract.* In case *any action* is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, *nor will they enforce any alleged rights directly springing from such contract. 'Portior Est. Conditio Defendentis.'* "

In 6 Ruling Case Law, Sec. 215, p. 819, the rule is stated to be:

"A contract or instrument which is *void* because it violates an express mandate of the law or the dictaces of public policy * * * *has no existence whatever. It has no legal entity for any purpose.*".

Counsel's claims in this regard somewhat overlap each other, and this will occasion some repetition in our reply.

(a) Counsel's chief claim seems to be that Sec. 5 invalidates such releases *only* as between employer and employee, and as they claim that relation did not exist between plaintiff and defendant, they say Sec. 5 did not invalidate the release as to defendant, the employer's joint tort feasor.

It is true the act applies only as between employer and employee, and in this sense Sec. 5 invalidates such releases only as between employer and employee, but it does not follow from this that such releases, if *void* as between the employer and employee, should be deemed *valid* as between the employee and a third party.

It is in accordance with the principles of the common law that it is held that a release that is void as

between the parties to it, must be deemed void as to strangers. The act here involved does not touch that question.

The release in question was between plaintiff and the C., B. & Q., and it did not even purport to release defendant. There was no release to defendant. Defendant's entire claim in this regard is based upon the alleged application of the *common law rule,* that a *valid* release of the liability of one joint tort feasor operates as a release of the liability of other joint tort feasors.

The application of this rule depends upon two conditions, neither of which is alone sufficient, namely, first, that the wrongdoers in question are liable as joint tort feasors; and second, that there has been a *valid* release of the liability of one of them. This second condition was absent in this case, for there was no valid release to either one of the joint tort feasors. The C., B. & Q. is the joint tort feasor whose liability defendant claims was first released and satisfied by the release in question. Yet as pointed out the C., B. & Q.'s sole and only liability to plaintiff was created by the act in question, and Sec. 5 invalidated the release as to that liability. It was in this way that Sec. 5 *indirectly* renders the rule invoked by defendant inapplicable, and thereby deprives defendant of a right which it might have had, if the release had not been invalidated. Sec. 5 does not *directly* affect the relations between plaintiff and defendant. It merely prevented the creation of, or destroyed a condition which was essential to the operation of the common law rule, which de-

fendant invokes, namely, it declares the release as between plaintiff and the C., B. & Q. to be void.

It is not important whether the release, as between plaintiff and the C., B. & Q., was rendered void by Sec. 5, or upon the ground that it was obtained by fraud, or otherwise, the important consideration is that it was in fact void, and as it was void the common law rule which defendant invokes has no application to the case.

There is nothing in the wording or purpose of Sec. 5 to support the claim that it invalidates such contracts only as between employer and employee but that they are valid as to third parties. Such contracts, of course, are always between employer and employee, and Sec. 5 proceeds upon that assumption, but Sec. 5, by its express terms, *unqualifiedly* declares such contracts void to the extent that they seek to release the carrier from any liability created by the Act, and it would require the court to read something into Sec. 5, which is not there, to warrant it in construing the section as invalidating such releases, only as between employee and employer, and leaving them valid as to strangers. Nor is there anything in the evident *purpose* of the section to warrant such a construction.

Sec. 5 proceeds upon the assumption that such contracts in the particular mentioned are contrary to public policy and are therefore declared void. It was its evident purpose to relieve employees from the unjust and oppressive provision of such contracts, by preventing the employer from escaping the consequence of his negligence. Yet if such contracts are against public policy as to the em-

ployer they are clearly so as to the employer's joint tort-feasor, and it is absurd to suppose that Congress intended to invalidate such contracts as to the employer, who had contributed something towards payment of benefits to the injured employee, but intended that they should remain valid as to the employer's joint tort-feasor, whose negligence contributed to the injury, but who neither paid nor contributed anything to or for the injured employee.

(b) But counsel say that Sec. 5 only invalidates such a release *to the extent* that it is intended to release the carrier "from any liability created by this act," but that it does not invalidate such a release *to the extent* that it releases the carrier's joint tort feasor.

As we have seen, plaintiff and the C., B. & Q. were engaged in interstate commerce at the time of the accident, and that the C., B. & Q.'s *only liability* as a joint tort feasor, or otherwise, was created by the Act, and it is clear that the Act invalidated the release to the extent of such liability. In other words, as applied to this case, the act is as broad as the release, and as between plaintiff and the C., B. & Q., the release was wholly and unconditionally void.

The claim that the release was not void to the extent that it released defendant, the C., B. & Q.'s joint tort feasor, is based upon the erroneous assumption that the release included, or was intended as a release to defendant. Of course, such was not the case. The release merely purports to release the C., B. & Q. and the company associated with it in the Relief Department. As previously stated it is only by vir-

tue of the common law rule that a release to one joint tort-feasor *operates* as a release to other joint tort-feasors, that it could in any event operate as a release to defendant, even though it were valid as between plaintiff and the C., B. & Q.

Counsel say that before the act was passed, such a release between plaintiff and the C., B. & Q. would operate as a release to it. If this be true, it is because until the act was passed, such a release as between plaintiff and the C., B. & Q. would be valid, but when it was rendered void by Sec. 5, or otherwise, it could not, under the common law, or any other law, operate as a valid release to defendant. Counsel say, putting the same contention in another form, that Sec. 5 was not intended to, and could not deprive defendant of its common law rights. Its common law rights were at most to have a *valid* release between plaintiff and the C., B. & Q. operate as a release to it; but it had no common law right to have a release which was void as between plaintiff and the C., B. & Q. operate as a valid release to it.

Again counsel say:

"The plaintiff's entire right of action against this defendant, being based exclusively upon the common law, he should be restricted to the common law, and defendant should be permitted its common law defenses." (Deft's. last brief, 11.)

Plaintiff was restricted to the common law in establishing his case against defendant, and defendant was permitted its common law defenses, but as previously stated the common law did not give defendant the right which counsel claim, namely, to

have a release which was void as between plaintiff and the C., B. & Q., operate as a valid release to defendant.

Defendant's alleged common law right depended entirely upon the application of the rule, that a valid release to one joint tort feasor operates as a valid release to others, yet, that rule was inapplicable in this case, for the reason that there was no valid release to one joint tort feasor.

(c) But counsel say that plaintiff's release to the C., B. & Q. can only be deemed void in *an action prosecuted under the act,* whereas, we claim that if the release was void as between the parties to it, it must be so held in *any action* in which it is relied upon, and especially in *this action.*

It will, no doubt, be conceded as a general proposition, that a contract which is declared void by statute, has no legal entity for any purpose, and no court in *any action* will lend its aid to enforce any right directly springing from it.

But counsel apparently contend that an exception should be made in reference to contracts declared void by Sec. 5, but we see nothing in the provisions of Sec. 5 to warrant such a claim.

As heretofore pointed out, the part of Sec. 5 which precedes the proviso, deals only with the question of the validity of such contracts, that is to say, contracts which are intended to exempt the employer from any liability created by the Act, and they are thereby expressly declared to be void.

This part of Sec. 5 does not use the word "action" at all. The word "action" is first used in the proviso, and refers entirely to the matter of set-off; that

is to say, when an action is prosecuted under the Act, and such a contract is interposed, while the contract will not defeat liability, nevertheless the carrier is permitted in such action to a set-off, to the extent that it contributed to the fund out of which the benefits were paid. The right of set-off is limited to actions prosecuted under the Act, but there is no such limitation so far as the validity, or invalidity, of such contracts is concerned.

Counsel construes Sec. 5 as though it read that such contracts will be deemed void only in any action prosecuted under the Act, but there is nothing in the language used, or the purpose of the section, to warrant such a construction.

As previously pointed out, there are perhaps no cases in which the question could arise, except in cases like this, where the suit is prosecuted by an employee against his employer's joint tort feasor, and, as previously stated, it is unreasonable to suppose that Congress intended that such a contract should be deemed void as to one of the wrongdoers, namely, the employer, but should be deemed valid as to the other wrongdoer, the employer's joint tort feasor, and where the employer has contributed something by way of benefits to the injured employee, but the joint tort feasor has contributed nothing.

We do not think that there is anything in the provisions of Sec. 5 which renders such contracts an exception to the general rule, and consequently we think that contracts rendered void by Sec. 5 can have no legal entity for any purpose, and that no court

should lend its aid to enforce any right directly growing out of the provisions of such contracts.

The primary question in this case is not, Was the release valid as between plaintiff and defendant? but is, Was it valid as between plaintiff and the C. B. & Q.? for it was not valid as between them; it could not *operate* as a valid release to defendant.

It must be borne in mind that the release was brought into this case by defendant, and was proven in *this action,* strictly as a matter of defense. In order for defendant to succeed under the rule, which it invokes, it was necessary that it should appear, first, that the C., B. & Q. was liable to plaintiff, as defendant's joint tort feasor; and second, that there was a valid release of such liability.

It appeared from the evidence that plaintiff was an employee of the C., B. & Q., and that he was injured while he and the C., B. & Q. were engaged in interstate commerce, and defendant proved the existence of the Burlington Relief Department, plaintiff's contract with that Department, and his acceptance of the benefits due thereunder. It was upon these facts, and in *this action* that it invoked the rule mentioned.

Now since the act in question superseded the common law as between plaintiff and the C., B. & Q., defendant was necessarily compelled to rely *in this action* upon *that act* as creating the C., B. & Q.'s liability to plaintiff as a joint tort feasor,—a fact or condition which was essential to the application of the rule which it invoked—and under the circumstances, it would be very strange if plaintiff was not

permitted *in the same action* to rely upon the provisions of *the same act* to invalidate the release.

When defendant proved the release *in this action,* the validity of the release became an issue *in this action,* and the court was bound to take judicial notice of all the provisions of the act in question, and by so doing it was apparent to it that as plaintiff and the C. B. & Q. were engaged in interstate commerce at the time of the accident that the release proven was in fact void. And as it was void as between plaintiff and one of its joint tort feasors, it could not operate as a valid release to the other.

Indeed, unless Sec. 5 can be construed as invalidating such releases between employer and employee, *only* in actions prosecuted under the Act, and in the sense that such releases shall be deemed valid *as between the employer and employee in all other actions* in which they may be brought in question, then the question as to whether plaintiff had the right to assert the invalidity of the release *in this action* is a question of general or local law, and is not a question which this court will consider.

(d) Again, counsel say: "Section 5 is inapplicable because its application would be *inequitable,*" and this for the alleged reason that as plaintiff sued under the common law, it would be inequitable to permit him to avail himself of any rights given by the act in question.

This claim is apparently based upon the erroneous assumption that the act in question is not as much a part of the law of Illinois as is the common law. Plaintiff had rights under both laws in so far as they applied to the different phases of his case. He

based his right of recovery solely on the common law and merely invoked the protection of the act in question to invalidate the release, which defendant proved, and upon which it relied as a mater of defense. In this we can see nothing inequitable.

Again, counsel say that to affirm the judgment would be inequitable in that it would allow plaintiff "double compensation for his injuries." As we have seen, plaintiff and his co-employees paid 85 per cent of the fund out of which plaintiff's benefits were paid, whereas the C., B. & Q., and its associated Company, only paid 15 per cent. And although defendant paid nothing, it was credited by the remittitur with the 15 per cent which the C., B. & Q., and its associated Company, contributed to the fund. Plaintiff received in benefits, only what he and his co-employees paid.

It was, we think, inequitable to have compelled plaintiff to credit defendant with the amount of the remittitur, when defendant never contributed a cent to the fund.

The rule that a release to one joint tort feasor operates as a release to all, is a highly technical rule, and is inequitable in most cases, and it certainly would be if it were applicable to this case. The equities, in our judgment, are all with the plaintiff.

(e) Again, counsel say: "The dissenting opinion of the Supreme Court of Illinois summarizes our contentions," and they cite from that opinion at length. The two justices, who rendered that opinion, apparently proceeded upon the erroneous theory that the act in question should be regarded as a for-

eign law, and this we think is the explanation of the conclusion they reached. For instance, they say:

"We do not agree with the majority that a plaintiff may bring an action under the law of *one jurisdiction* and prevent a valid defense under that law by invoking the law of *another and different jurisdiction.*"

In answer to a similar view, which had been advanced by the Supreme Court of Connecticut, this court in *Mondou* v. *N. Y., N. H. & H. R. Co.*, 223 U. S., p. 56, said:

"When Congress, in the exertion of the power confided to it by the constitution, adopted that act, it spoke for all the people and all the states, and therefore established a policy for all. That policy is as much the policy of Connecticut *as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.* As was said by this court in *Claflin* v. *Houseman*, 93 U. S., 130, 136, 137; 23 L. Ed., 833, 838, 839: 'The laws of the United States are laws in the different states, and just as much binding upon the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but it is a concurrent, and, within its jurisdiction, paramount sovereignty. * * * The fact that a State court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor are to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.'"

In *Hogarty* v. *Phila. & R. Ry. Co.*, 245 Pa. St., 452,

which involved a contract like the one in question, the court, in speaking of the part of Section 5 in question, said that it "is the announcement of a rule of public policy applicable to all cases within the scope of the statute, *with a like effect as though promulgated by one of our acts.*"

For the reasons stated we think that the State court was bound to treat Section 5 of the act in question for all intents and purposes, the same as though it were a section of an Illinois state statute, and in the majority opinion rendered in this case it was so treated.

In the dissenting opinion it is also said:

"The only cause of action alleged or proved was created by the law of this State, and, although the plaintiff could only recover under that law, the opinion of the majority is that *the defendant was rightfully denied its defense under the same law.*"

This merely begs the question. Defendant had no right under the law of this State to have an invalid or void release of its joint tort feasor operate as a valid release to it. Section 5 merely invalidated the release as between the parties to it, and under the general law a release, invalid as between the parties to it, must be deemed invalid as to strangers.

Again, in the dissenting opinion it is said:

"If the law of this State was good for the purpose of recovery, it was equally as good to establish a defense against the cause of action existing under the same law."

As we have seen, "the law of this State" includes the act in question as much as it does the common law, and if there is any conflict between the two, the act in question is controlling in that re-

gard. Both laws were in force, and both were applicable to different phases of the case. The common law, in so far as it gave plaintiff a right of action against defendant; the act in question, in so far as it invalidates releases like the one in question, and the common law, in so far as it holds that a valid release to one joint tort feasor releases other joint tort feasors, and, conversely stated, in so far as it holds that if an alleged release to one joint tort feasor is in fact invalid or void, it cannot operate as a valid release to the other joint tort feasors.

And again it is said:

"To say that a law regulating the rights and duties of parties and giving a right of action for a violation of such rights and duties, *and declaring what shall be a release of such right of action,* is available for sustaining the action and not available for a defense is to destroy that equality of right which the law is intended to and must preserve."

In this they erroneously assume that the common law was the only law "regulating the rights and duties of the parties," etc. They also erroneously assume that because plaintiff sued under the common law, that, therefore, defendant should be permitted to prove and avail itself of the benefits of a release, which was declared void by statute.

Without pursuing the subject further, we respectfully submit that there is no merit in the claim that the release, if void between the parties to it, should, nevertheless, be deemed valid as between plaintiff and defendant.

Counsel cite the case of *Missouri, K. & T. Ry. Co.* v. *West,* 232 U. S., 682.

In that case the question upon which this court's

jurisdiction depended was as to whether the deceased was employed by an Express Company or by a Railway Company; if the former, the State law governed; if the latter, the Federal law governed; and it was held that he was employed by the Express Company, and not by the Railway Company, and hence that his rights were to be determined by the State law.

If we had sought in this case to recover against defendant under the provision of the act, and the relation of employer and employee did not exist between plaintiff and defendant, as the State Court held was the fact, then the *West* case would be in point. But we did not seek to recover under the act, and hence that case is not in point.

Counsel next cite the case of *Robinson* v. *Baltimore & Ohio R. R. Co.*, 237 U. S., 84. That was a case between a Pullman porter and a Railroad Company. The plaintiff in that case made a contract with the Pullman Company,

"by which he released all railroad corporations over whose line the cars of that Company might be operated while he was traveling in its service, 'from all claims for liability of any nature or character whatsoever on account of any personal injury or death.' "

It was there pointed out that Section 5 only nullifies contracts "the purpose or intent of which shall be to enable any common carrier to exempt itself from *any liability created by this act,*" and it was held that as the act only creates a liability as between employer and employee, and that as plaintiff was not defendant's employee, that, therefore, the release

was not of a liability created by the act and hence, that it was not nullified by Section 5.

It will be observed that the plaintiff in that case *gave a release which expressly released the defendant Railroad Company* from a liability not created by the act, and for the reasons stated it was held that Section 5 did not invalidate such release; whereas in the case at bar, plaintiff *did not give a release of any kind to the defendant Railroad Company*, and the question whether if he had given such a release, it would, or would not, have been nullified by Section 5, is not involved in this case.

The release here involved, and the release upon which defendant necessarily relies, was a release by plaintiff to his employer, the C., B. & Q., and was a release of a liability created by the act, and hence it was necessarily void under Section 5 as between plaintiff and the C., B. & Q.

The *Robinson* case does not touch the question here involved, namely, as to whether a release which is void under Section 5, as between the parties to it, can operate as a valid release to a third party.

For the reasons heretofore stated, we respectfully request this court to either dismiss the writ of error for want of jurisdiction, or to affirm the judgment, and if the court agrees with our claim that it is apparent that the writ of error was sued out and prosecuted only for delay, we request the assessment of additional damages as for delay, etc.

JAMES C. MCSHANE,
Attorney for Defendant in Error

Office Supreme Court, U. S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

No. 375

THE CHICAGO AND ALTON RAILROAD COMPANY,
Plaintiff in Error,
vs.
JOSEPH M. WAGNER,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR

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Attorneys for Plaintiff in Error.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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REPLY BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

MAY IT PLEASE THE COURT:

We will refer to the parties as heretofore, and to the Employers' Liability Law as "the act."

Plaintiff's last brief is substantially a repetition. We conclude from an analysis of his points and argument, that it is his contention that Section 5 of the act absolutely made void for all purposes, the release from liability to the C. B. & Q., obtained by it, from the acceptance of benefits by the plaintiff. We contend that before

the effect of that release can be nullified by Sec. 5, two principal propositions must be established by the plaintiff. They are: (1) that the relation of employer and employe exists;

(2) That the action is brought to recover *a liability created by the act.*

It is conceded that this relation did not exist and that this suit did not seek to recover damages upon a liability created by this act. To avoid repetition, we respectfully ask the court to consider our points and arguments made in our brief, replying to plaintiff's motion to dismiss and also our last brief filed. We will endeavor to confine this brief to replying to plaintiff's last brief.

It is first contended that we do not seek a reversal because of the error in admitting evidence to establish plaintiff and the C. B. & Q. were engaged in interstate commerce at the time of the injury. (Plff.'s brief, p. 2.) We contended heretofore, and now contend that *is* one of the errors relied upon. On pages 22 and 39 of our brief, resisting the motion to dismiss, is contained our argument, which we will not repeat. The fact is, that the testimony relating to interstate commerce, admitted over defendant's objection, is the basis upon which the court held Sec. 5 nullified the release. Necessarily, if such evidence were refused, there would be no theory upon which plaintiff could make his present claim. Obviously, if it be held our contentions are correct then the trial court committed error, in admitting evidence to establish the plaintiff and C. B. & Q. were engaged in interstate commerce, in this case, where the plaintiff seeks to recover upon a common law liability. We contend that the correctness of the ruling admitting this evidence is herein involved.

It is next contended our brief does not argue the er-

rors committed in giving and refusing instructions. To avoid repetition, we have not fully discussed these points in our second brief, but we refer to our brief on the motion to dismiss. (pp. 31, 37, 38 and 39.) Counsel contends that we did not mention the errors again in our second brief. On page 3 of the second brief we set forth the errors relied upon, and the giving of plaintiff's instruction number 9 and the refusal to give defendant's instructions are specifically mentioned. The entire argument in support of our contention, that the act should not be applied to this case, supports our point that it was error to give plaintiff's instruction number 9 and to refuse defendant's instructions mentioned. Counsel's assumption, that the propriety or impropriety of giving or refusing these instructions is not involved, is erroneous.

It is next contended (Plff.'s Brief, p. 6) that no federal question is involved. This we demonstrated in our first brief. Our position is, and it is held by both opinions of the state Supreme Court, that without the application of Section 5 defendant is entitled to judgment. The defendant's liability has been fixed in this case solely because the lower courts construed and applied Section 5 so as to nullify the effect of the release. Clearly then, this federal question was presented in all the lower courts, and the correctness of the construction and application is now before this court. The proper construction and application of this act is not a common law question because it involves the interpretation of a federal statute. Were the several state courts, in cases like this, permitted to construe and apply this law, it might result in diversified rulings. To obtain uniform rulings on these federal questions it is necessary for this court to determine the proper construction and application of this act. We conclude that there is no merit to the argument that the construction and application of Section 5 nullifying a release

good at common law, is not a federal question. As stated by the state Supreme Court, were it not for the interpretation and application it placed upon the act, the judgment would be reversed. For a full discussion, we refer the court to our brief resisting the motion to dismiss, beginning on page 4.

Answer to Plaintiff's Point II.

Under this point counsel first refers, in detail, to the relief department organization. This organization is not involved herein because the effect of the release obtained by the acceptance of benefits was determined by the state Supreme Court in this case, following the former opinion in *Eckman* v. *C. B. & Q., supra.* It was there held that the release obtained by the C. B. & Q. was valid and constituted an accord and satisfaction of the claim for injuries; was not against public policy, and was not a payment in the nature of insurance. This ruling was modified only, because of the construction and application of Section 5 of the act. The relation between the plaintiff and C. B. & Q. Relief Department is governed by an entire contract. The clause referring to the acceptance of benefits and release resulting therefrom is a part of the contract and must be given full force and effect. We do not understand that this court will undertake to pass upon the public policy of the state. This court will notice that the Eckman case, *supra,* and the opinion in this case, are such, that a right and immunity has been denied defendant by the application of Section 5 of the act, because without the construction and application made by the lower courts, defendant is not liable. This assertion is conceded by plaintiff. (Plff.'s brief, p. 11.)

It is next contended that it has not been decided that the release in question would operate as a release to a

third person. We assume this court will not pass upon that question. If it be held here that Section 5 does not apply, then the state courts will determine the effect of the release.

Plaintiff's counsel next contends (pp. 14 and 15) that Section 5 is applicable to invalidate the release even before a suit to establish liability under the act is brought. His contention is that if the contract in question is intended to exempt the carrier from a liability created by the act, it is entirely void for all purposes from the time it is made.

We contend that such a contract is valid at all times for all purposes, except to operate as a release of the employer from the liability created by the act; that it is capable at all times of operating as a release of a joint *tort feasor* and capable at all times of operating as a release of the employer of a liability created by the act unless the employe elects to declare it, to that extent, void.

Had plaintiff sued the C. B. & Q. to recover damages on account of its negligence and the C. B. & Q. proven the relief contract and acceptance of the benefits in question, as a defense, unless plaintiff had then first proven that he and it were engaged in interstate commerce at the time he was injured and also elected to declare the release void under Section 5, the release would have been held valid and the C. B. & Q. would have had judgment. The court would hold the release valid until the plaintiff in his suit under the act insisted on its invalidity.

Assuming, however, for the sake of argument, that the act does control plaintiff's rights against the C. B. & Q., and that, therefore, there was no valid release of the C. B. & Q., it does not necessarily follow that there is no valid release of the defendant. We find this unusual situation existing because plaintiff's rights against the

C. B. & Q. are controlled solely by the act, and his rights against defendant solely by the common law. These rights and defenses are entirely different. Congress has legislated that plaintiff cannot release his rights against the C. B. & Q. by accepting benefits under a relief contract. It has not legislated in respect to plaintiff's ability to release his right against defendant. His privilege and ability in this regard are as heretofore. Before the passage of this act, his acceptance of benefits from defendant's joint *tort feasor* would have constituted defendant's release. The same must be true now.

In arguing his second point, namely, that if the release were void as between the plaintiff and the C. B. & Q., it was necessarily void as to defendant, he cites the case of *McMullen* v. *Hoffman*, 174 U. S., 654. The contract in that case was entirely illegal under the common law and the court would not enforce any rights springing from it.

We do not ask for the enforcement of any rights springing from an illegal contract. We ask that the release to the C. B. & Q. operate as a release to defendant, and contend that the release of the C. B. & Q., as far as defendant is concerned, is not invalidated because Section 5 is inapplicable in this case.

Assuming that Section 5 is applicable in this case (which we deny) the point, wherein plaintiff's counsel and we differ, is that the release in question has only one attribute, viz., its capacity to release the C. B. & Q. He assumes that prior to the passage of the act the release had only this attribute, and further that Section 5 has denied the release of this capacity. He contends that the release is entirely invalidated by the section and that therefore there is no release of the first joint *tort feasor* on which, the rule of law that a release

of one joint *tort feasor* releases all, can operate. We contend that prior to the passage of the act, the release resultant from plaintiff's acceptance of benefits had two distinct attributes; first, its capacity to release the C. B. & Q., and second, its capacity to release a joint *tort feasor* of the C. B. & Q. We further contend that Congress in passing Section 5 deprived the release of its first attribute, namely, its capacity to release under certain circumstances, the C. B. & Q.; that because Congress had no intent toward, and did not enter the field of, the carriers' joint tort feasor, it did not deprive the release of any of its other attributes or its capacity to release defendant. Had this accident happened prior to the passage of this act and the facts surrounding it been the same, the release would have operated, first as a release of the C. B. & Q., and secondly, because its negligence concurred with the negligence of the joint *tort feasor,* as a release of such joint *tort feasor.*

The accident having happened after the passage of Section 5, there accrued to plaintiff two different causes of action: first, a statutory cause of action against the C. B. & Q., different from the kind that would have accrued to him before its passage; second, a cause of action against defendant of the same character as he would have had before its passage. No law having been passed affecting plaintiff's rights as against defendant, such acceptance of benefits should now operate as a release of defendant's liability.

We do not ask this court, as counsel contends, to determine the effect of the release under the state law, but to note that defendant thereunder is released from liability. In support of plaintiff's position, that a release does not operate to a stranger to the contract, counsel cites two cases. They are neither federal nor Illinois decisions.

In *Fitzgerald* v. *Union Stock Yards Company*, 89 Neb., 393, the release was intended as an accord and satisfaction to the Burlington alone, and was not intended to be a satisfaction to others.

In *Kitman* v. *C. B. & Q. Ry. Co.*, 113 Minn., 350, the decision turned entirely upon pleadings.

After this court determines the proper construction and application of Section 5, the effect of the release and accord and satisfaction are state questions.

It is next contended (Plff.'s Br., p. 12) that this court will only inquire whether *plain error* was committed. There is no middle ground in the points we have raised. Either our contentions are proper, or otherwise.

Counsel now divides his argument into two points.

> "*First.* Was the release void as between plaintiff and the C. B. & Q.?
>
> *Second.* Could it operate as a valid release to the defendant?"

It is contended (Plff.'s Br., p. 13) that because plaintiff and the C. B. & Q. were engaged in interstate commerce, the duties and obligations of both were fixed solely and exclusively by the act. To substantiate this claim, counsel relies *solely* upon the facts that plaintiff and C. B. & Q. were engaged in interstate commerce at the time of the injury, and that the relation of employer and employe existed between them.

Section 5 provides "That any contract, rule, regulation or device, whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall, to that extent, be void."

In other words, he must also show that the C. B. & Q. exempted itself from *a liability created by the act.*

In his argument, counsel assumes that it is conceded

that plaintiff and C. B. & Q. were engaged in interstate commerce. It is our contention that, in this case (not between employer and employe and not brought to recover under a liability created by the act), the court erroneously admitted evidence over the objection of defendant, to establish that the plaintiff and the C. B. & Q. were engaged in interstate commerce at the time of the injury. If this evidence had been rejected, then, there could not have been a construction and application of Section 5.

In *Robinson* v. *B. & O. R. R. Co., supra,* this court clearly decided that Section 5 only applied when the relation of employer and employe existed. If that section is inapplicable to this case, then plaintiff's argument fails.

Counsel's discussion (pp. 25 to 30) assumes, first, that it is contended by defendant that federal laws are not exclusive of state laws upon the same subject. We make no such contention; nor does the dissenting opinion of the state Supreme Court. The dissenting opinion states (Trans., p. 593):

> "Congress has supreme control over the subject of commerce between the several states, and no one disputes the proposition that whenever a suit is brought and facts are averred which constitute a cause of action under an act of Congress relating to that subject, the act supersedes all legislation of the same subject by the states."

The dissenting opinion expressed the idea that it was inequitable to permit the plaintiff to sue the defendant upon the only liability he could, namely, the common law, and then deny that same defendant in the same jurisdiction all of the defenses allowed it by the common law. Congress knew that the employer, if imposed with greater obligations, could adjust its business affairs to meet them. The defendant, not being in a contractual relation with the plaintiff, has no opportunity of adjusting its business affairs to meet the additional obligations

imposed by this act, if it is construed to apply to it. We do not dispute that the federal law becomes a part of the state law and is exclusive and supersedes state laws in the field in which Congress legislates. Our contention here is, and it is supported by the Robinson case, *supra*, that Congress did not intend this act to apply to common carriers other than the employer. It is contended that there is a distinction between a release which specifically names any operating railroad company, as in the Robinson case, and a release which is declared valid by the state Supreme Court. The argument has no force. The state Supreme Court, in the Eckman case, held the acceptance of benefits constituted a complete accord and satisfaction and release.

The concluding point is that the Robinson case does not decide whether a release, which is void under Section 5, between the parties can operate as a valid release to a third party. But, the Robinson case *does decide*, that the Employers' Liability Act is applicable *only* where the relation of employer and employe exists, and that a release by contract, to a third party who paid nothing, was *not invalidated*, where the plaintiff was not employed by such third person. The situations in that case and the case at bar are substantially the same.

Respectfully submitted,

SILAS H. STRAWN,
EDWARD W. EVERETT,
J. SIDNEY CONDIT.

CHICAGO & ALTON RAILROAD COMPANY *v.* WAGNER.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 375. Submitted November 29, 1915.—Decided December 20, 1915.

Section 5 of the Employers' Liability Act has no application to releases given to those who are not employers. *Robinson* v. *Balt. & Ohio R. R.*, 237 U. S. 84.

Where one of two carriers, joint tort feasors, is the employer and obtains from an employé who was injured in interstate commerce a release which is invalid under § 5 of the Employers' Liability Act, there is no denial of Federal right by a state court in holding that such release is also invalid as against the other joint tort feasor and does not operate to release the latter from liability beyond the right to set off the amount contributed by the employing carrier to the amount recovered by the plaintiff.

265 Illinois, 245, affirmed.

THE facts, which involve the construction and application of § 5 of the Employers' Liability Act of 1908, and the validity of a judgment for damages for injuries of a railroad employé, are stated in the opinion.

Mr. Silas H. Strawn, *Mr. Edward W. Everett* and *Mr. T. Sidney Condit* for plaintiff in error:

Section 5 of the Employers' Liability Act is inapplicable in this case because plaintiff was not an employé of defendant. Nor does that section invalidate a release, resultant to a joint tort feasor from the acceptance of relief benefits under a relief contract. *Robinson* v. *Balt. & Ohio R. R.*, 237 U. S. 84; *Mo., Kan. & Tex. Ry.* v. *West*, 232 U. S. 682.

The misapplication of § 5 of the Employers' Liability Act and the denial of plaintiff's asserted construction thereof, present a Federal question giving this court juris-

diction. *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 499; *St. Louis, I. M. & So. Ry.* v. *McWhirter*, 229 U. S. 265; *St. Louis & I. M. Ry.* v. *Taylor*, 210 U. S. 281, 292; *Seaboard Air Line* v. *Tilghman*, 237 U. S. 487; *Toledo, St. L. & West. R. R.* v. *Slavin*, 236 U. S. 454; *Seaboard Air Line* v. *Padgett*, 236 U. S. 668; *Southern Ry.* v. *Crockett*, 234 U. S. 725; *M., K. & T. Ry.* v. *West*, 232 U. S. 682; *Nutt* v. *Knut*, 200 U. S. 12, 19; *McCormick* v. *Market Bank*, 165 U. S. 538; *El Paso N. E. Ry.* v. *Gutierrez*, 215 U. S. 87; *Straus* v. *Am. Publishers' Assn.*, 231 U. S. 22; *Houston & Tex. Cent. R. R.* v. *Texas*, 177 U. S. 66, 77; *Buel* v. *Van Ness*, 8 Wheat. 311, 321; *Mathews* v. *Zane*, 4 Cranch, 381.

Where the highest court of the State assumes that the record sufficiently presents for its decision, a question of Federal right, this court will take jurisdiction. *Mallinckrodt Chemical Works* v. *Missouri*, 238 U. S. 41; *Chambers* v. *Balt. & Ohio R. R.*, 207 U. S. 142, 148; *San Jose Land Co.* v. *San Jose Ranch Co.*, 189 U. S. 177; *Haire* v. *Rice*, 204 U. S. 291; *Home for Incurables* v. *New York*, 187 U. S. 157; *Mo., Kan. & Tex. Ry.* v. *Elliott*, 184 U. S. 530.

Mr. James C. McShane for defendant in error:

The state court's holding that plaintiff's acceptance of benefits from the Burlington relief department did not operate as a release, or satisfaction, to defendant, does not present a Federal question.

The release in question was void under § 5, as between plaintiff and the C., B. & Q., and the real question is as to whether, being void as between the parties to it, it could operate as a valid release to defendant.

This is a common-law question, which depends upon the application, or non-application, of the common-law rule, that a release to one joint tort feasor operates as a release to all joint tort feasors, and hence, is not a Federal question.

Assuming, for sake of argument, that the question is a Federal question, and that it was especially set up or claimed, etc., it was not erroneously decided.

The release was void as between the parties to it, and, consequently, it could not operate as a valid release to defendant. *McMullen* v. *Hoffman*, 174 U. S. 654; 6 Ruling Case Law, § 215, p. 819.

MR. JUSTICE HUGHES delivered the opinion of the court.

Joseph M. Wagner brought this action in the Superior Court of Cook County, Illinois, against the Chicago & Alton Railroad Company to recover damages for injuries alleged to have been sustained through its negligence. At the time of the accident, he was employed by the Chicago, Burlington & Quincy Railroad Company as a conductor in charge of a switching crew and was engaged in moving cars over a track of the Chicago & Alton Railroad Company in Chicago,—the track being used by the Burlington company under an arrangement with the Alton company. He was injured by striking a semaphore post which, as he alleged, was in dangerous proximity to the track. The Burlington company was not a party to the suit. In defense, the Alton company proved that Wagner was a member of the relief department of the Burlington company, to which the employés of that company made monthly contributions, and that in his agreement with that company it was provided that his acceptance "of benefits for injury" should operate "as a release and satisfaction of all claims against said company, and all other companies associated therewith in the administration of their relief departments, for damages arising from or growing out of said injury." The Alton company was not thus associated with the Burlington company, and the release by its terms did not run to it. But it was insisted that the Burlington company was a

joint tort feasor with the Alton company and hence that release to the former would operate to discharge the latter. It was found by the state court that after the injury Wagner had accepted from the relief fund of the Burlington company the sum of $1,231 as benefits, and that there had been paid in his behalf for hospital bills, etc., $1,349.59; and it was further found that the contribution of the Burlington company did not exceed fifteen per cent. of this amount, or $387.09. In rebuttal (and over the defendant's exception) Wagner introduced evidence that at the time of the accident he was engaged as the employé of the Burlington company in interstate commerce, and he contended that the agreement for the release of that company through acceptance of benefits from the relief fund was invalid under § 5 of the Employers' Liability Act. The trial court refused to give a peremptory instruction in favor of the Alton company and also denied a request to instruct the jury, in substance, that if it found that Wagner had accepted payment from the Burlington company in satisfaction of his claim against that company arising from the injury, such acceptance would be a bar to this action against the Alton company. The court did charge that if the Alton company was found guilty, it should not be credited with any sum which the Burlington company had paid. To these rulings the Alton company excepted. A verdict was rendered against it for $15,000, and judgment was entered accordingly. The Appellate Court, First District, required a remittitur of $387.09, the amount found to have been contributed by the Burlington company to the benefits received, and affirmed the judgment for the remainder. 180 Ill. App. 196. And the judgment for the reduced amount was affirmed by the Supreme Court of the State. 265 Illinois, 245.

The jurisdiction of this court is invoked upon the ground that, in refusing to give effect to the release, the state court miscontrued § 5 of the Employers' Liability

Act.[1] *St. Louis & Iron Mountain Rwy.* v. *Taylor*, 210 U. S. 281, 293; *St. Louis & Iron Mountain Rwy.* v. *McWhirter*, 229 U. S. 265, 275.

The action was not brought under that act. There were allegations in the original declaration to the effect that Wagner at the time of the injury was engaged in interstate commerce as an employé of the Burlington company, but it seems to have been agreed upon the trial that the action was not governed by the Federal statute; and this indeed was manifest, as the Burlington company was not a party to the action and the Alton company was not the plaintiff's employer. *Robinson* v. *Balt. & Ohio R. R.*, 237 U. S. 84, 91. It was tried as a common-law action on the case.

It was also undisputed that the Alton company was not a party to the contract for release or associated in the Burlington's relief department. Section 5 of the Federal act has plainly no application to releases given to those who are not employers (*Robinson* v. *Balt. & Ohio R. R.*, *supra*) and we do not understand that there was any contention or ruling to the contrary in the state court. The Alton company simply claimed the benefit of the release to the Burlington company upon the ground that the Burlington company was a joint tort feasor. But the rule invoked, that the release of one joint tort feasor is a release of all, is a rule of the common law,—in this case of the

[1] This section is as follows, Act of April 22, 1908, c. 149, 35 Stat. 65, 66:

"SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employé or the person entitled thereto on account of the injury or death for which said action was brought."

common law of Illinois. *Chicago* v. *Babcock*, 143 Illinois, 358, 366. That is, assuming that the Burlington company was the employer and that the contract for its discharge from liability for this injury through the acceptance of benefits from its relief department was invalid under § 5 of the Employers' Liability Act, the question whether that release, thus invalid as against the Burlington company, would operate to discharge the Alton company as a joint tort feasor from its common-law liability was not, and we do not find that it was held to be, a matter of Federal law. The Supreme Court of the State said upon this point, after stating that there was no valid release to the plaintiff's employer: "If it" (the release) "was not valid so far as the Burlington company was concerned, it was clearly invalid as to the plaintiff in error and constituted no defense to this action." This, as we view it, was but to say that the release could not aid the Alton company for the very plain reason that the alleged joint tort feasor had not been discharged. The state law did not recognize the discharge of the defendant by virtue of a release of a joint tort feasor which, under the law applicable thereto, was found to be without validity.

The only Federal question which it can be said was decided was with respect to the validity of the release as between Wagner and the Burlington company. It is urged that § 5 was wholly inapplicable in an action brought against a third person to enforce a liability not created by the Federal act. The argument is, in substance, that in this action against the Alton company, inasmuch as it is not brought to enforce the liability imposed by the Federal statute, § 5 cannot be considered for any purpose; that is, that under § 5 the release can be deemed to be invalid only so far as it is actually used to protect the Burlington company from liability in a suit against it under the act. This involves, we think, a fundamental misconception. It is, of course, impossible to determine

whether a joint tort feasor is discharged except by asking what would happen if he were sued. The liability created by the act arose when the injury was received, and it is clear that if it was received while Wagner was engaged in interstate commerce, his acceptance of benefits under the relief contract would not bar an action against his employer. *Phila., Balt. & Wash. R. R.* v. *Schubert*, 224 U. S. 603, 613. When, therefore, the Alton company sought to escape from liability, otherwise existing under the state law, by reason of a release to the Burlington company, it was entirely competent for the plaintiff to show the nature of his employment and that the asserted release was within the Federal statute and could not operate as a discharge of the Burlington company with respect to the injury sustained. And the state court found upon abundant evidence that Wagner was engaged as an employé of that company in interstate commerce when he was hurt.

There was thus no misconstruction of the Federal act in holding that the contract between Wagner and the Burlington company, and his acceptance of benefits thereunder, did not release the latter from liability for the injury and that under § 5 that company, assuming it to be a joint tort feasor, would merely have the right to set off any sum which it had contributed to the benefits received; and there was no denial by the state court of any Federal right in declining to treat the relief contract, and the acceptance of benefits, as a discharge of the Alton company.

Judgment affirmed.